Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

AMERICAN PRESIDENT LINES, LTD.,
and AMERICAN PRESIDENT COMPANIES, LTD.,
Petitioners,

v.

GAMMA-10 PLASTICS, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL A. SNYDER
Counsel of Record
RAY, ROBINSON, CARLE, DAVIES & SNYDER
850 West Jackson Boulevard
Suite 310
Chicago, Illinois 60607
(312) 421-3110
Attorney for Petitioners

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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QUESTION PRESENTED

In a dispute between a shipper and a carrier concerning lost or damaged cargo, may the carrier rely on the provisions of a federal statute explicitly incorporated into the bill of lading and the tariff?

LIST OF PARTIES

All parties to the proceeding in the court of appeals appear in the caption of the case.

American President Companies, Ltd. is the parent corporation of American President Lines, Ltd., a wholly owned subsidiary. American President Companies, Ltd. has an interest in the following subsidiaries and affiliates:

- American Consolidation Services, Ltd.
- American President Trucking Company, Ltd.
- APL Information Services, Ltd.
- APL Land Transport Services, Inc.
- Eagle Marine Services, Ltd.
- Natomas Real Estate Company

The stock of American President Companies, Ltd. is listed on the New York and Pacific Stock Exchanges.

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Petitioners,

v.

GAMMA-10 PLASTICS, INC.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Petitioners, American President Lines, Ltd., and American President Companies, Ltd., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, reprinted as Appendix A ("App. A") at page A-1, is officially reported at 32 F.3d 1244 (8th Cir. 1994).

The district court's Order and Memorandum Opinion filed July 20, 1992, reprinted as App. B at B-1, is unreported. The district court's Judgment Order filed July 19, 1993, reprinted as App. C at C-1, is unreported. The district court's Order and Opinion filed December 17, 1993, reprinted as App. D at D-1, is reported at 839 F. Supp. 1359 (D. Minn. 1993).

JURISDICTION

Petitioners seek review of the judgment of the Court of Appeals for the Eighth Circuit, which was dated and entered on August 10, 1994. A timely petition for rehearing was filed on September 8, 1994, and denied on October 6, 1994. *See* App. E at E-1. This petition for certiorari was filed within ninety days of that date, and this Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Carriage of Goods by Sea Act § 3(6), 46 U.S.C. app. § 1303(6) (fourth paragraph):

> In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered . . . .

Shipping Act of 1984, § 8(a)(1), 46 U.S.C. app. § 1707(a)(1):

> . . . [E]ach common carrier and conference shall file with the [Federal Maritime] Commission, and keep open to public inspection, tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and on any through transportation route that has been established. . . . Tariffs shall—
>
> . . .
>
> (E) include sample copies of any loyalty contract, bill of lading, contract of affreightment, or other document evidencing the transportation agreement.

STATEMENT

Petitioner American President Companies, Ltd., is the parent company of petitioner American President Lines, Ltd. ("APL"), a Delaware corporation doing business as a multimodal carrier. The respondent is a Minnesota corporation that sold plastic resin pellets. In the summer of 1988, the respondent contracted with APL for the transportation of containers of plastic resin from Atlanta to cities in China. Between July and October, 1988, the respondent shipped twenty-two containers with APL in four separate shipments. The present controversy involves the losses that the respondent claims to have suffered as a result of APL's alleged mishandling of this cargo.

APL's standard-form bill of lading, which evidences the contract of carriage for each of these shipments, includes a typical "clause paramount."[1] This clause extends the application of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. app. §§ 1300-15, beyond the time when it applies as a matter of law (*i.e.*, while the goods are on board the vessel) to include the period before loading and after discharge. (During this period, the Harter Act, 46 U.S.C. app. §§ 190-196, would otherwise apply.) In particular, the clause paramount extends the fourth para-

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[1] The "clause paramount" in APL's standard-form bill of lading provides:

> CLAUSE PARAMOUNT. The receipt, custody, carriage and delivery of the Goods are governed by the provisions of the transportation agreement evidenced hereby and incorporated by this reference, including . . . (iii) the provisions of the U.S. Carriage of Goods by Sea Act, 1936, ("COGSA"). . . . Such Act . . . shall be extended to apply . . . before the Goods are loaded on and after they are discharged from the Vessel, and throughout the entire time during which the Carrier is responsible for the Goods under the transportation agreement.

graph of section 3(6) of COGSA, 46 U.S.C. app. § 1303(6), to the period before loading and after discharge. This paragraph provides that a carrier, such as APL, "shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered."

To avoid any misunderstanding, clause 24 of the bill of lading made the same point explicitly:

> TIME FOR SUIT. The Carrier and the Vessel shall be discharged from all liability in contract and in tort in respect of loss, damage, delay, misdelivery or conversion unless suit is brought within one year after delivery of the Goods or the date when the Goods should have been delivered.

The entire bill of lading, including these two provisions, was also on file with the Federal Maritime Commission as part of APL's tariff, as required by section 8(a)(1)(E) of the Shipping Act, 46 U.S.C. app. § 1707(a)(1)(E).

The first shipment under this arrangement arrived at its destination in China on September 9, 1988, but the respondent's customers did not collect the cargo until various times in late 1988 and early 1989. The second shipment arrived in Hong Kong on September 24, 1988, and was held there pending instructions from the respondent; it was finally delivered in Shanghai in November 1988. On instructions from the respondent, APL held the third and fourth shipments in Hong Kong and California, respectively. But for the respondent's instructions to hold these two shipments, all of the cargo should have been delivered in China long before July 1989.

The respondent filed the present action in a Minnesota state court on July 2, 1990, well over a year after the cargo was or should have been delivered. APL removed

the case to federal court under 28 U.S.C. § 1441, the district court having jurisdiction under 28 U.S.C. § 1332. After removal, APL pled several affirmative defenses, including that the action was time-barred under the one-year time-for-suit provisions of COGSA section 3(6) and clause 24 of the bills of lading.

The district court, granting respondent's motion for partial summary judgment, struck APL's time-bar defense. *See* App. B at B-1. It held that the case was governed by the Harter Act, which does not contain a statutory time-for-suit provision. Although section 7 of COGSA, 46 U.S.C. app. § 1307, permits the extension of COGSA to the post-discharge period, the court concluded that the clause paramount was ineffective to do so here because the bills of lading had not been delivered to the respondent until after the goods had been shipped. *See* App. B at B-6. The court implicitly held that clause 24 (which is permissible under the Harter Act) was ineffective for the same reason. Finally, the court followed *Allstate Insurance Co. v. International Shipping Corp.*, 703 F.2d 497 (11th Cir. 1983), to hold that APL could not rely on the tariff as a source of constructive notice. *See* App. B at B-5.

A jury awarded the respondent $500,000 in damages for delay of and damage to the cargo and awarded the petitioners $12,769.98 for unpaid freight on the first shipment. The district court entered judgment on this verdict. *See* App. C at C-1. In post-trial proceedings, the court awarded the respondent pre-judgment interest of $308,417. *See* 839 F. Supp. at 1364; App. D at D-11. Both parties appealed.

The court of appeals affirmed in part and reversed in part. In ruling on APL's time-bar defense, it employed the so-called "fair opportunity" doctrine, which several courts have applied to carriers' attempts to limit their liability to $500 per package under section 4(5) of COGSA, 46 U.S.C.

app. § 1304(5). *See* 32 F.3d at 1250-54; App. A at A-10 to A-19. The court decided that APL had satisfied this doctrine with respect to the first shipment because APL was able to prove that the respondent had received an original bill of lading and negotiated it to a bank two days after the containers had been loaded on the container train in Atlanta. *See* 32 F.3d at 1253-54; App. A at A-17 to A-18. As the respondent was thus bound by the clause paramount and the time-for-suit provision, the complaint should have been dismissed with respect to the first shipment. With respect to the other shipments, however, APL had not proven when the respondent had received the bill of lading, and therefore did not satisfy the fair opportunity doctrine. *See* 32 F.3d at 1254; App. A at A-18 to A-19. Accordingly, APL was unable to rely on the clause paramount or the time-for-suit provision. The court of appeals also agreed with *Allstate* to conclude that APL could not rely on the tariff to prove constructive notice of the application of COGSA or the time-for-suit provision. *See* 32 F.3d at 1254; App. A at A-19. APL's entitlement to the benefit of the one-year time-for-suit provisions with respect to these last three shipments is the focus of the present petition.

REASONS FOR GRANTING THE PETITION

The true issue in this case is whether a business can rely on reasonable provisions in its standard-form contract when it enters into a commercial transaction. The court below believed that a multi-million dollar company active in international trade was too unsophisticated to read a tariff, remember the provisions of a standard-form bill of lading that it had accepted in a previous transaction, or otherwise discover the contractual terms under which its cargo (with an invoice value in the hundreds of thousands of dollars) was being carried half-way around the world. Unfortunately, some other courts of appeals have adopted a similar approach. Accordingly, carriers are faced with a variety of judicial inventions, such as the so-called "fair opportunity" doctrine, that preclude their reliance on bill of lading provisions, on tariff provisions, and even on federal statutes unless they can prove that the other party to the contract received some particular form of notice.[2] Not all courts of appeals have followed the same approach, however, so the industry also faces a variety of conflicting interpretations involving these doctrines and the governing federal statutes. These conflicts breed wasteful litigation, make insurance more difficult and expensive to

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[2] The current situation is somewhat surprising, for this Court has held that cruise lines can rely on the provisions of a standard-form passenger ticket with no more notice than that provided by "three pages of fine print." *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 590 (1991); *see also id.* at 593. This Court has also held that an air carrier does not lose the benefit of its limitations if it fails to provide the notice specifically required by the applicable international agreement. *See Chan v. Korean Air Lines*, 490 U.S. 122 (1989). It is hard to believe that an international commercial trader, such as the respondent, should be entitled to a higher degree of protection than cruise line and airline passengers.

obtain, and interfere with the efficient structuring of transactions.

There is no dispute that one year is a reasonable time in which to require suit to be brought. Congress explicitly adopted a one-year time-for-suit provision in COGSA section 3(6), this provision undoubtedly governed these transactions during the time that the goods were on board vessels, and the Eighth Circuit applied the provision to the first shipment. Nor is there any dispute that the contract between the parties can extend COGSA's application to the post-discharge period—as it did for the first shipment. The only dispute before the Court is whether APL can rely on the bill of lading's clause paramount that so extends COGSA, or on a clause that explicitly provides a one-year time-for-suit provision substantially identical to COGSA section 3(6), for the last three shipments. On this issue, the decision below is in conflict with decisions of other courts of appeals on several levels, at least two of which are worthy of this Court's attention. First, the Eighth Circuit, along with the Eleventh Circuit, is in conflict with decisions in the First and Fifth Circuits on the effect of a valid tariff provision. Second, the Eighth Circuit is now part of an eight-circuit split on the application of the fair opportunity doctrine.

THE COURTS OF APPEALS ARE IN CONFLICT ON THE FORCE OF VALID TARIFF PROVISIONS

This Court has long recognized that " 'tariffs bind both carriers and shippers with the force of law.' " *Crancer v. Lowden*, 315 U.S. 631, 635 (1942) (quoting *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939)); *cf. Security Services, Inc. v. Kmart Corp.*, 114 S. Ct. 1702, 1706 (1994) (the shipper is bound to pay the tariff rate notwithstanding ignorance or misquotation);

Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 120-121 (1990) (same). Indeed, there is no dispute that shippers such as the respondent are bound by the *rates* that a carrier such as APL files in a tariff. The courts below, however, held that the respondent was not bound by the *terms and conditions* that APL filed as part of its tariff—that the respondent could bring suit more than "one year after delivery of the goods or the date when the goods should have been delivered," despite the express prohibition in the filed tariff.

Distinguishing rates from terms and conditions has never found any favor in the decisions of this Court. *Cf. Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 417-421 (1959) (upholding an exculpatory clause filed in the tariff). In making this distinction, the courts below instead followed *Allstate Insurance Co. v. International Shipping Corp.*, 703 F.2d 497, 500 (11th Cir. 1983), which also held that a carrier could not rely on a one-year time-for-suit provision that had been included in the carrier's filed tariff. The Eleventh Circuit implicitly held that a shipper is bound by only that portion of the tariff that involves the carrier's rates or charges.

The Eighth and Eleventh Circuit approach is in conflict with decisions of the First and Fifth Circuits. In *Insurance Co. of North America v. Puerto Rico Marine Management, Inc.*, 768 F.2d 470 (1st Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986), the court permitted a carrier to rely on a one-year time-for-suit provision under circumstances that were essentially the same as those in *Allstate* (and the present case). In the process, the court specifically considered the Eleventh Circuit's reasoning and rejected it. *See* 768 F.2d at 477-478. The First Circuit concluded that the *Allstate* court had erred in failing to recognize that the carrier

before it (like APL) was required to file not only its rates but also the terms and conditions of the contract of carriage. This conflict does not involve merely inconsistent dicta or disagreements about general principle. The courts of appeals, including the court below, are reaching results that are directly contrary to those that other courts of appeals have reached in the same situations.

The Eighth and Eleventh Circuits are also in conflict with decisions of the Fifth Circuit. In several cases, the Fifth Circuit has permitted a carrier to rely on the terms and conditions of the contract of carriage (in particular, a provision based on section 4(5) of COGSA that limits the carrier's liability to $500 per package) in part because of the binding nature of the tariff. As the court explained in *Brown & Root, Inc. v. M/V Peisander*, 648 F.2d 415, 421 (5th Cir. 1981), "a tariff validly filed is not a mere contract but is the law promulgating the applicable standard." *See also Gebr. Bellmer Kg. v. Terminal Services Houston, Inc.*, 711 F.2d 622 (5th Cir. 1983) (per curiam); *Wuerttembergische & Badische Versicherungs-Aktiengesellschaft v. M/V Stuttgart Express*, 711 F.2d 621 (5th Cir. 1983) (per curiam).

The clear and direct conflict between the First Circuit and the Eleventh Circuit may originally have been unworthy of this Court's attention. Quite simply, the Eleventh Circuit erred in its interpretation of the prior caselaw. The subsequent First Circuit decision clearly and convincingly exposes the error and demonstrates the proper analysis. This Court's decisions point in the same direction. Until last August, therefore, the Eleventh Circuit's error might justifiably have been ignored as an aberration that was unlikely to cause serious problems. Now that the Eighth Circuit has reviewed the conflict, however, and agreed with the Eleventh Circuit's erroneous conclusion

despite the First Circuit's well-reasoned analysis, the conflict can no longer be dismissed so quickly. It is now clear that the Eleventh Circuit's mistake will have wider influence, and this Court should step in to correct the problem before it becomes any worse.

The Eighth and Eleventh Circuits' mistake goes far beyond erroneous legal analysis; the decision below imposes an intolerable burden on the shipping industry. Under the precedent established in this case, a carrier can no longer rely on the standard terms contained in its bill of lading and filed as part of its tariff unless it can prove the circumstances of the shipper's acceptance of the bill of lading. As a practical matter, a carrier will need to negotiate every contract individually with each shipper before it can be sure of the terms under which it operates. Rather than placing the minimal burden on shippers of checking the tariff (which is, after all, the entire point of requiring carriers to file tariffs), the courts below have placed a far heavier burden on carriers—and have done so with no legal justification.

The inability to rely on standard-form contracts would be a heavy burden for any large-scale business with a high volume of relatively inexpensive transactions, but it is particularly onerous when bills of lading are involved because carriers frequently have little control over when they issue a bill of lading. For example, shippers customarily demand "on board" bills of lading (generally to satisfy letter of credit requirements), so a carrier is typically unable to issue the bill of lading until the goods have been loaded on the vessel—which may be well after the carrier took control of the goods. Similarly, shippers frequently demand "freight prepaid" bills of lading (again because letters of credit often require them), and the carrier is unable to comply until the shipper has paid the

freight charges. Indeed, in the present case APL was unable to issue bills of lading in the second and third shipments until the respondent paid the freight charges. But under the Eighth Circuit's analysis, APL lost the benefit of its standard-form contract because of the respondent's failure to make timely payment!

THE COURTS OF APPEALS ARE IN CONFLICT ON THE FAIR OPPORTUNITY DOCTRINE

The significance of filing a tariff resurfaces in the context of the so-called "fair opportunity" doctrine. This doctrine imposes a judicially-created requirement that a carrier must satisfy before it can rely on statutory rights under COGSA or contractual rights granted by the bill of lading.[3] If a carrier does not give a shipper sufficient

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[3] COGSA applies as a matter of law only between the time the goods are loaded on the vessel and the time they are discharged from the vessel. *See generally* 2A BENEDICT ON ADMIRALTY §§ 41-44 (7th ed. 1994). Most bills of lading, however, contain a clause paramount extending COGSA's application to periods that would otherwise be governed by the Harter Act. *See, e.g.,* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 148 (2d ed. 1975). For cases (such as the present) in which COGSA does not apply as a matter of law during the relevant period, therefore, a carrier's rights are either purely contractual (under a bill of lading provision such as clause 24) or a combination of statutory and contractual (under a clause paramount contractually extending the application of COGSA). Because "a high proportion of cargo damage occurs" during loading and unloading, 2A BENEDICT ON ADMIRALTY § 169, at 16-45 (7th ed. 1994), cargo cases commonly arise in situations where the Harter Act would generally apply. Accordingly, many "fair opportunity" cases fall into this statutory/contractual pattern. *See, e.g., Mori Seiki USA, Inc. v. M.V. Alligator Triumph*, 990 F.2d 444, 446 (9th Cir. 1993) (cargo was damaged after unloading); *Caterpillar Overseas, S.A. v. Marine Transport Inc.*, 900 F.2d 714, 717 (4th Cir. 1990) (during inland transportation before loading); *Carman Tool & Abra-*

(continued...)

notice to satisfy the fair opportunity requirement, most U.S. courts hold that it may not rely on the statutory or contractual right at issue. This has generally been the right to limit liability to $500 per package, *see* COGSA § 4(5), 46 U.S.C. app. § 1304(5), but here the Eighth Circuit extended the doctrine to govern the one-year time-for-suit provision of section 3(6), 46 U.S.C. app. § 1303(6). The doctrine itself is highly questionable, and when it does apply there is a conflict among the circuits on whether filing a tariff provides sufficient notice to satisfy its requirements.

Courts of appeals in eight circuits have addressed the fair opportunity doctrine, and at least five distinct approaches have emerged. Most recently, the First Circuit addressed the issue in *Henley Drilling Co. v. William H. McGee & Co.*, 36 F.3d. 143 (1st Cir. 1994). Both parties in *Henley Drilling* assumed that the doctrine applied, but the court nevertheless "refrain[ed] from embracing the 'fair

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[3] (...continued)

sives v. Evergreen Lines, 871 F.2d 897, 899 (9th Cir. 1989) (after unloading); *Gebr. Bellmer Kg. v. Terminal Services Houston, Inc.*, 711 F.2d 622, 624 (5th Cir. 1983) (per curiam) (after unloading); *Brown & Root, Inc. v. M/V Peisander*, 648 F.2d 415, 417 (5th Cir. 1981) (before loading); *Toshiba International Corp. v. M/V "Sea-Land Express,"* 841 F. Supp. 123, 125 (S.D.N.Y. 1994) (during inland transportation after unloading).

Other "fair opportunity" cases also fall into this statutory/contractual pattern because they involve cargo in domestic trade or cargo carried on deck—two other situations in which COGSA does not apply as a matter of law. *See, e.g., Institute of London Underwriters v. Sea-Land Service, Inc.*, 881 F.2d 761, 763 (9th Cir. 1989) (deck cargo); *Mu, Inc. v. Puerto Rico Maritime Shipping Authority*, 1988 AMC 347 (4th Cir. 1987) (domestic trade); *Pan American World Airways v. California Stevedore & Ballast Co.*, 559 F.2d 1173, 1175 n.3 (9th Cir. 1977) (per curiam) (domestic trade); *Z.K. Marine, Inc. v. M/V Archigetis*, 808 F. Supp. 1561, 1563 (S.D. Fla. 1992) (deck cargo).

opportunity' doctrine . . . in any form" because it found the doctrine's existence "to be a problematic question" that need not be resolved in a situation where the carrier had met whatever requirements might plausibly be imposed. *See* 36 F.3d at 146 n.5. We take the view that there is no legitimate basis for the doctrine, and the First Circuit was correct to question its existence. Ideally, the Court should take this opportunity to correct the errors that the lower courts have made and bring U.S. law into line with the rest of the world's maritime nations. *See infra* at 19, 24 (discussing the international conflict on the issue). Alternatively, the Court could use this case as a vehicle to resolve a long-standing and well-recognized intercircuit conflict. But even if the Court prefers to focus on the tariff issue without directly addressing the fair opportunity doctrine, a ruling on the tariff question would play a significant role in minimizing this intercircuit conflict as well.

The lower courts that have accepted the doctrine are in hopeless conflict on how to apply it. The Ninth Circuit has, until now, applied the strictest version, requiring the bill of lading to recite the substance of the COGSA provision on which the carrier seeks to rely. *See Nemeth v. General S.S. Corp.*, 694 F.2d 609, 611-612 (9th Cir. 1982); *Komatsu, Ltd. v. States S.S. Co.*, 674 F.2d 806, 809-811 (9th Cir. 1982); *Pan American World Airways v. California Stevedore & Ballast Co.*, 559 F.2d 1173, 1175-77 (9th Cir. 1977) (per curiam); *see also Travelers Indemnity Co. v. Vessel Sam Houston*, 26 F.3d 895, 898 (9th Cir. 1994) (summarizing the law of the circuit); *Mori Seiki USA, Inc. v. M.V. Alligator Triumph*, 990 F.2d 444, 448-449 (9th Cir. 1993) (same); *Institute of London Underwriters v. Sea-Land Service, Inc.*, 881 F.2d 761, 766 (9th Cir. 1989) (same); *Carman Tool & Abrasives v. Evergreen Lines*, 871 F.2d 897, 899 & n.3 (9th Cir. 1989) (same); *Tessler*

Brothers (B.C.) v. Italpacific Line, 494 F.2d 438, 443 (9th Cir. 1974) (establishing the law of the circuit).

The Fifth Circuit, explicitly rejecting this standard in a case involving a bill of lading substantially identical to the one before the Ninth Circuit in *Pan American*, holds that the statutory language need not be in the bill of lading so long as appropriate disclosure is provided by the carrier's tariff. *See Brown & Root*, *supra*, 648 F.2d at 419-25; *see also Couthino, Caro & Co. v. M/V Sava*, 849 F.2d 166, 168-171 (5th Cir. 1988) (summarizing the law of the circuit); *Gebr. Bellmer Kg.*, *supra*, 711 F.2d at 624 (same); *Wuerttembergische*, *supra*, 711 F.2d at 622 (same). The Eleventh Circuit has accepted this analysis in the "fair opportunity" context. *See Insurance Co. of North America v. M/V Ocean Lynx*, 901 F.2d 934, 939-941 (11th Cir. 1990), *cert. denied*, 498 U.S. 1025 (1991).

In the Second Circuit, it appears that a clause paramount alone will satisfy the fair opportunity requirement. *See General Electric Co. v. M/V Nedlloyd*, 817 F.2d 1022, 1029 (2d Cir. 1987), *cert. denied*, 484 U.S. 1011 (1988); *Binladen BSB Landscaping v. M.V. "Nedlloyd Rotterdam,"* 759 F.2d 1006, 1017 n.12 (2d Cir.), *cert. denied*, 474 U.S. 902 (1985); *see also Union Carbide Corp. v. M/V Michele*, 764 F. Supp. 783, 786 (S.D.N.Y. 1990) (summarizing the law of the circuit); *E.M.S. Industrie S.A. v. Polskie Towarzystwo Okretowe*, 608 F. Supp. 1133, 1134-35 (E.D.N.Y. 1985) (same).

The Fourth Circuit has been similarly willing to recognize incorporation by reference, holding that a "short form" bill of lading satisfies the doctrine's requirements when it incorporates COGSA and the long form bill of lading by reference (and the long form bill of lading contains the statutory language). *See Cincinnati Milacron, Ltd. v. M/V American Legend*, 804 F.2d 837 (4th Cir.

1986) (en banc) (per curiam); *see also Pearson v. Leif Hoegh & Co.*, 1992 AMC 1025, 1029-32 (4th Cir. 1992) (per curiam) (relying on bill of lading clauses and the tariff); *Caterpillar Overseas, S.A. v. Marine Transport Inc.*, 900 F.2d 714, 719-720 (4th Cir. 1990) (relying on clauses in the standard-form bill of lading that would have been issued if the cargo had not been damaged before loading); *Aetna Insurance Co. v. M/V LASH Italia*, 858 F.2d 190, 193-194 (4th Cir. 1988) (relying on bill of lading clauses and the tariff); *Mu, Inc. v. Puerto Rico Maritime Shipping Authority*, 1988 AMC 347, 349-350 (4th Cir. 1987) (same). The Sixth Circuit seems to have adopted the same approach, albeit in circumstances that would have satisfied a more demanding standard. *See Acwoo International Steel Corp. v. Toko Kaiun Kaish, Ltd.*, 840 F.2d 1284, 1288-89 (6th Cir. 1988).

Even before the decision below and before the First Circuit questioned the doctrine's existence in *Henley Drilling*, several lower courts[4] and numerous commentators[5] had

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[4] *See, e.g., Carman Tool, supra*, 871 F.2d at 899 n.3 ("the courts are divided"); *Couthino, Caro & Co., supra*, 849 F.2d at 169 ("courts have different views"); *Cincinnati Milacron, Ltd. v. M/V American Legend*, 784 F.2d 1161, 1164 (4th Cir.) ("circuits . . . are in conflict"), *superseded* 804 F.2d 837 (4th Cir. 1986) (en banc) (per curiam); *E.M.S. Industrie, supra*, 608 F. Supp. at 1135 ("federal circuits are in conflict").

[5] *See, e.g.*, 2A BENEDICT ON ADMIRALTY § 166, at 16-24 to -30 (7th ed. 1994); THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 9-36, at 375-376 (1987); Richard W. Palmer & Frank P. DeGiulio, *Terminal Operations and Multimodal Carriage: History and Prognosis*, 64 TUL. L. REV. 281, 352 (1989) ("There is a split among the circuits"); JoAnne Zawitoski, *Federal, State, and International Regulation of Marine Terminal Operators in the United States*, 64 TUL. L. REV. 439, 457-458 (1989) (discussing the conflict); Jonathan Rodriguez-Atkatz, *Apportionment of Risk in Vessel and Marine Terminal Contracts*, 64 TUL. L. REV. 497,

(continued...)

recognized the square conflict among the circuits on this issue. Indeed, at least two commentators had explicitly called on this Court to resolve the conflict. *See* Daniel A. Tadros, *COGSA Section 4(5)'s "Fair Opportunity" Requirement: U.S. Circuit Court Conflict and Lack of International Uniformity; Will the United States Supreme Court Ever Provide Guidance?*, 17 TUL. MAR. L.J. 17, 34-36 (1992); Michael F. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 TEXAS L. REV. 1251, 1265-66, 1273 & nn.143-144 (1989).

By questioning the doctrine's very existence, the First Circuit has widened this long-standing conflict in one direction. The decision below widens it in the other direction, for in this case APL satisfied the standards that have been imposed in every other circuit. APL's bill of lading includes a clause paramount and clause 24 recites the substance of section 3(6) of COGSA, thus satisfying the Ninth Circuit standard. APL's tariff provides adequate notice, thus satisfying the fair opportunity standard of the Fifth and Eleventh Circuits. The clause paramount meets

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[5] (...continued)
510 (1989) ("courts . . . have applied varying standards"); Thomas R. Denniston, Carter T. Gunn & Alfred E. Yudes, Jr., *Liabilities of Multimodal Operators and Parties Other Than Carriers and Shippers*, 64 TUL. L. REV. 517, 523 (1989) ("circuit courts differ in their interpretation of what constitutes a fair opportunity"); JoAnne Zawitoski, *Limitation of Liability for Stevedores and Terminal Operators Under the Carrier's Bill of Lading and COGSA*, 16 J. MAR. L. & COM. 337, 355-360 (1985) (discussing the conflict); Nicholas J. Healy & Jerome Scowcroft, *Admiralty and Shipping*, 1984 ANN. SURVEY AM. L. SUPP. 1, 22-24 (same); Mary T. Reilly, *COGSA $500 Package Limitation: Shipper's Opportunity to Declare a Higher Value*, 13 J. MAR. L. & COM. 245, 250-252 (1982) (same); Laurence B. Alexander, Comment, *Containerization, the Per Package Limitation, and the Concept of "Fair Opportunity,"* 11 MAR. LAW. 123, 134-135 (1986) (same).

the standard of the Second, Fourth, and Sixth Circuits. And any one of these facts satisfies the standard of the First Circuit—if the First Circuit even recognizes the doctrine. But the Eighth Circuit now holds that a carrier must go beyond all of this and prove when the shipper received the bill of lading and what the shipper did with it.

Once again, there is a clear and direct conflict in which the courts of appeals, including the court below, are reaching results that are directly contrary to those that other courts of appeals have reached in the same situations—indeed, with respect to the same standard-form bill of lading. The conflict is not inadvertent. The Fifth and Ninth Circuits have explicitly acknowledged their refusal to follow each other's position. *See, e.g., Brown & Root, supra*, 648 F.2d at 423-424 (declining to follow *Pan American, supra*); *Carman Tool, supra*, 871 F.2d at 899 n.3 (recognizing the disagreement with the Fifth Circuit). The First Circuit carefully reviewed the field before taking its unique position. *See Henley Drilling, supra*, 36 F.3d at 145. This is not a conflict on which further percolation would be valuable. The lower courts have been addressing the doctrine in the COGSA context for over twenty years, *see Tessler Brothers, supra*, 494 F.2d at 443, and in the process have fully discussed a wide range of possibilities. The Ninth Circuit alone has addressed the doctrine in at least eight published opinions, and the Fourth Circuit has already taken the issue *en banc* (with at least four more appellate decisions applying the *en banc* ruling!). Scholarly commentary has also addressed the doctrine in great detail. *See, e.g.*, Michael F. Sturley, *The Fair Opportunity Requirement Under COGSA Section 4(5): A Case Study in the Misinterpretation of the Carriage of Goods by Sea Act*, 19 J. MAR. L. & COM. 1 (1988). Finally, it is unrealistic to expect the lower courts to resolve the conflict without this Court's intervention. The circuits are simply moving

further apart, as can be seen from the two most recent decisions on the doctrine (*i.e.*, the decision below and *Henley Drilling, supra*, in the First Circuit).

Bad as this intercircuit conflict is, the situation becomes even worse when one recognizes that COGSA is the U.S. enactment of an international treaty popularly known as the "Hague Rules."[6] The treaty was intended, as its official name suggests, to unify the law relating to bills of lading, but there is a direct international conflict on the "fair opportunity" doctrine. Although over ninety countries have adopted the convention, no foreign court has adopted this peculiarly American doctrine. *See, e.g.*, Sturley, *The Fair Opportunity Requirement*, *supra*, 19 J. MAR. L. & COM. at 22-24; Tadros, *supra*, 17 TUL. MAR. L.J. at 34. Furthermore, the Supreme Court of Canada—our largest trading partner—rejected the suggestion that a carrier should be subject to anything resembling the U.S. doctrine. *See Anticosti Shipping Co. v. St-Amand*, 1959 S.C.R. 372, 374-377, 19 D.L.R.2d 472, 473-475, 1959 AMC 1526, 1527-29 (Can.).

We urge this Court to bring U.S. law into line with the rest of the world's maritime nations by rejecting the doctrine entirely. *See generally* Sturley, *The Fair Opportunity Requirement*, *supra*. Alternatively, we ask the Court to resolve the intercircuit conflict and hold that APL satisfied the doctrine's requirements, either by filing a tariff that fully disclosed the provisions on which it now seeks

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[6] Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, T.S. No. 931, 120 L.N.T.S. 155. *See generally* 2A BENEDICT ON ADMIRALTY § 15 (7th ed. 1994) (summarizing the history of COGSA); GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 143-144 (2d ed. 1975) (same).

to rely or by including the clause paramount and the time-for-suit provision in its standard-form bill of lading.

THE IMPORTANCE OF RESOLVING THE CONFLICTS

The importance of the issues raised here is not limited to the maritime context. Standard-form contracts are a normal part of business throughout the world, and the validity of their terms is important to virtually every business and consumer in the country. Filed tariffs play a role in the carriage of goods and passengers by land, air, and water, and thus they have an impact on everyone who travels and on every business and consumer who purchases goods that have been transported.

Even if we limit our focus to the carriage of goods by sea, the issues here are worthy of the Court's attention. Each year, hundreds of billions of dollars worth of cargo are carried to and from the United States by sea. *See* Sturley, *The Fair Opportunity Requirement*, *supra*, 19 J. MAR. L. & COM. at 2 & n.4. With the recent approval of GATT, such trade is likely to increase. Most of this business is automatically subject to COGSA during the period that the cargo is on board a vessel. But the governing standards before loading and after discharge (when "a high proportion of cargo damage occurs," *see* note 3, *supra*), as well as for certain situations in which COGSA does not necessarily apply by its terms, are determined by the provisions of the bill of lading and the tariff. Cases such as the present, which establish the legal rules that will govern the relationship between carriers and ship-

pers,[7] go to the very heart of this multi-billion dollar industry.

Not only are the issues important, but conflicts in this field are particularly intolerable because litigants can easily exploit them through forum-shopping. A cargo owner may bring an *in rem* action in admiralty in any district in which a vessel is located, regardless of whether the forum has any other connection with a case. *See* 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3817, at 170 (2d ed. 1986). Similarly, the cargo owner may bring an *in personam* action, either in admiralty or at law, wherever it can serve process on the defendant or attach its property. *See id.*, § 3817, at 170-171 & nn.8-9. In the present case, for example, the respondent was able to bring an action against APL in the District of Minnesota because APL maintains an office there. The four shipments, however, originated in Georgia and went overland to the West Coast to begin their trans-Pacific journey. But if the respondent had filed suit in a court in the Eleventh

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[7] In fact, the range of interests affected is much broader than just carriers and shippers, for a number of other parties in a typical transaction derive their rights from the original parties to the bill of lading. Under a "Himalaya clause" (which is included in most bills of lading), stevedores, terminal operators, inland carriers, and other third parties can obtain the benefit of the carrier's limitations and exclusions. *See* 2A BENEDICT ON ADMIRALTY § 169 (7th ed. 1994). Thus if the carrier loses its statutory or bill of lading rights, the stevedore suffers as well. *See, e.g., Pan American, supra*, 559 F.2d at 1175. Similarly, the rights of third parties such as consignees and subrogated insurers are determined by the shipper's rights. *See, e.g., Carman Tool, supra*, 871 F.2d at 900-901 (consignee); *Insurance Co. of North America v. Puerto Rico Marine Management, supra*, 768 F.2d at 473 (insurer). *See generally Stolt Tank Containers, Inc. v. Evergreen Marine Corp.*, 962 F.2d 276, 279 (2d Cir. 1992) (noting the importance of third parties' being able to rely on the terms of the bill of lading).

Circuit (where the goods were shipped), the Ninth Circuit (where the ocean voyages began), Hong Kong (where goods were transshipped), or China (the ultimate destination), the result would likely have been very different.[8]

Furthermore, this is a subject where uniformity is particularly important. *See, e.g., Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 301 (1959); GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 191-192 (2d ed. 1975). By its very nature, the carriage of goods by sea is a multi-jurisdiction enterprise. Everyone involved in a commercial maritime transaction must know how the law will allocate possible losses so that they can decide who must insure (or make provision for self-insurance), and how much the insurance should cost. When the rules differ according to the forum, multiple parties face a potential loss depending on where the case is heard. As a result, each party must insure against the loss and there is a needless "double insurance" expense.

Conflicting legal standards also force the parties to do their best to comply with the standard in each jurisdiction in which they are subject to suit. Even when this is possible, the expense must ultimately be passed on to the consumers who purchase the transported goods. For a carrier such as APL, these expenses could be staggering: APL has approximately 65 offices in the United States (including at least one office in each federal circuit) and 115 overseas offices in 40 different foreign countries. Its ships regularly call at 55 different ports and, through its multimodal operations, it provides service to approximately 400 for-

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[8] Although the courts below followed the Eleventh Circuit on the tariff issue, the Eighth Circuit's fair opportunity analysis is in conflict with Eleventh Circuit doctrine.

eign cities. Complying with a different legal standard in each jurisdiction would impose a significant burden on a carrier's ability to function efficiently, and consumers would be the ultimate losers. This is particularly true when the burden imposed is as unreasonable as that announced by the Eighth Circuit in this case, which seriously undermines a carrier's ability to rely on a standard-form contract.

Congress was particularly conscious of the need for uniform law in this field when it enacted COGSA. *See generally* Sturley, *Observations*, *supra*, 67 TEXAS L. REV. at 1271. During the floor debates, the principal reason given for the statute was the need to implement the international treaty to achieve uniformity in the law governing ocean bills of lading. *See*, *e.g.*, 79 CONG. REC. 13341 (1935) (statement of Sen. White) ("The [COGSA] bill is designed to bring about uniformity in ocean bills of lading."), *reprinted in* 1 THE LEGISLATIVE HISTORY OF THE CARRIAGE OF GOODS BY SEA ACT AND THE *TRAVAUX PRÉPARATOIRES* OF THE HAGUE RULES 589 (1990); *id.* at 8954 (statement of Sen. Thomas) ("[The COGSA bill] is simply to bring about uniform usage of bills of lading in the transshipment of goods and makes the usage uniform."), *reprinted in* 1 LEGISLATIVE HISTORY at 587. The committee reports in both houses claim uniformity as the bill's most important purpose. *See*, *e.g.*, S. REP. NO. 742, 74th Cong., 1st Sess. 4 (1935), *reprinted in* 1 LEGISLATIVE HISTORY at 534 (bill "will accomplish real uniformity"); H.R. REP. NO. 2218, 74th Cong., 2d Sess. 6 (1936), *reprinted in* 1 LEGISLATIVE HISTORY at 526 ("most outstanding benefits are simplification and uniformity of bills of lading"). Conflicting interpretations on the applicability of COGSA under a clause paramount and a tariff not only interfere with the effective operation of a federal statute, they undermine the principal Congressional purpose in enacting the

statute. The Court's recent decision to grant certiorari in No. 94-623, *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*[9] offers implicit recognition of this point.

The international conflict on the existence of the fair opportunity doctrine presents an even stronger justification for this Court's review. The United States ratified the Hague Rules primarily to provide a uniform international law for bills of lading. When U.S. courts create judicial doctrines in conflict with the interpretation given to the treaty in every other contracting state, they undermine the very purpose of the uniform law treaty. The problems of intercircuit conflicts are magnified at the international level. Even if it were possible to predict where litigation would occur, the difficulty and expense of monitoring treaty interpretations throughout the world is far greater than for monitoring variations among the circuits. And the threat of forum shopping becomes even more daunting when practiced on an international scale. It is no surprise that this Court has recognized the importance of seeking international uniformity in the analogous context of the carriage of goods by air. *See, e.g., Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 256 (1984) (stressing

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[9] The issue in *Sky Reefer* is whether a consignee is bound by a foreign arbitration clause in a bill of lading subject to COGSA. The *Sky Reefer* petition focuses on the effect of COGSA section 3(8), but the district court's decision to enforce the arbitration clause implicitly relied on the conclusion that a party who does not receive the bill of lading until well after the goods have been shipped is nevertheless bound by its terms; otherwise the consignee would not have been bound by the arbitration clause. If this Court affirms the decision of the First Circuit, it may address this point in a manner that could be of guidance to the Eighth Circuit. Although we urge the Court to grant certiorari in the present case now, the Court may also wish to consider holding this petition until it has decided *Sky Reefer*.

the Warsaw Convention's objective of international uniformity). The need for the Court's intervention is every bit as compelling in this context.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL A. SNYDER
Counsel of Record
RAY, ROBINSON, CARLE, DAVIES & SNYDER
850 West Jackson Boulevard
Suite 310
Chicago, Illinois 60607
(312) 421-3110
Attorney for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 93-3285/3286/94-1190

Gamma-10 Plastics, Inc.,

Plaintiff, Appellant
and Cross-Appellee,

v.

American President Lines, Ltd.;
American President Companies, Ltd.,

Defendants, Appellees
and Cross-Appellants.

Appeal from the United States District Court
for the District of Minnesota, Third Division

Submitted: May 11, 1994
Filed: August 10, 1994

Before McMILLIAN, Circuit Judge, LIVELY,* Senior Circuit Judge, and WOLLMAN, Circuit Judge.

LIVELY, Senior Circuit Judge.

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* The HONORABLE PIERCE LIVELY, Senior Circuit Judge for the Sixth Circuit, sitting by designation.

A jury in this maritime case rendered a verdict in favor of the shipper and against the carrier for failure to deliver goods and for damages to other goods caused by negligence of the carrier. In post-trial proceedings the district court awarded prejudgment interest to the plaintiff, but refused to award attorney fees. Both parties appealed and the court consolidated the appeals from the judgment following trial and from the order deciding post-trial motions.

I.

A.

This case arises out of a 1988 contract for carriage by sea between Gamma-10 Plastics, Inc. (G-10) and American President Lines, Ltd. (APL). The contract called for APL, one of the largest steamship carriers in the world, to transport G-10's plastic resin from the United States and deliver it to customers at various ports in China. The resin was packed in bags, which in turn were placed by APL in large sealed containers for shipment. The controversy concerns four shipments of plastic resin: (1) five sealed containers of resin shipped to Whampoa, China in August, 1988; (2) five containers shipped to Shanghai, China, in October, 1988; (3) six containers shipped to Hong Kong in October, 1988; and (4) four containers held by APL in Los Angeles after a dispute arose over the previous shipments.

Somehow, G-10's first shipment of resin was lost on the docks of Whampoa. Throughout the investigation of the lost goods, APL claimed that they were on the Tung Kwong Hau Pier (Tung Pier), and provided G-10 with the name and telephone number of a contact person in Whampoa for verification. APL maintained at trial that there was nobody present at the docks to pick up the resin be-

cause G-10 had a poor product and lost its principal Chinese contract (the Acada contract) with Wallon Energies. G-10, on the other hand, claimed that a second Chinese company, Vic International, assumed the Acada contract and that an agent for Vic International went to Tung Pier three times in search of the goods but never found them. In response to the loss of its resin, G-10 sent APL two written complaints for lost or missing goods in October and November of 1988. APL ignored the complaints, and G-10 charged that APL's conduct became vindictive after the grievances were filed.

G-10's second shipment was loaded on board ship at Los Angeles on September 8, 1988, and discharged at Hong Kong on September 24. For some reason APL did not make out a bill of lading for this shipment until October 4, 1988, after the resin had been unloaded in Hong Kong. According to G-10's president, this shipment was supposed to have gone directly to Shanghai. At any rate, because Vic International succeeded the original purchaser, Wallon Energies, as consignee, G-10 directed APL to hold the shipment in Hong Kong until delivery in Shanghai could be arranged. There is some confusion as to the whereabouts of the goods prior to their reappearance in Shanghai on November 10. G-10 claims that it asked APL to deliver the goods to Shanghai by October 13, but that the goods did not arrive timely. APL counters that G-10 did not release the goods to Shanghai until November 4, and that it dutifully shipped the goods by November 10.

In November, 1988, G-10's president, Joseph Kopstein, flew to China to find the missing resin from the two shipments. When he finally located the resin from the first shipment in Whampoa, someone had removed it from the sealed containers and many of the resin bags were ripped. G-10 contended at trial that as a result of the condition

of the goods and the three month delay in locating them, it suffered the cancellation of the Acada contract and lost its primary Chinese customer, Vic International. As with the first shipment, when G-10 located the resin from the second shipment in Shanghai, it had been taken out of the sealed containers and damaged. After paying the ocean freight and storage charges, G-10 finally sold this resin on July 12, 1989.

G-10 alleges on appeal that after the first shipment was lost, APL purposefully interfered with its attempt to re-sell the million pounds of resin that remained in China. G-10's potential customers insisted on testing samples of the resin before buying large amounts. However, APL refused to provide access to the resin until G-10 paid $60,000 claimed to be due in shipping and storage costs. G-10 asserts that the costs claimed by APL resulted from APL mistakenly shipping the third batch of resin to China. G-10 sent this resin to Los Angeles, but specifically told APL not to transport it to Hong Kong. At oral argument APL admitted mistakenly shipping the resin. According to G-10, APL not only delivered the goods to China, but stored them in a very expensive Hong Kong terminal despite suggestions from APL's own Los Angeles office to store the goods in free storage at a nearby APL facility in Taiwan. G-10 further claims that APL violated U.S. shipping laws by charging it at a rate that was 30% higher than the published tariff permitted. G-10 thus contends that the $60,000 claimed by APL was not its responsibility.

G-10 cites several other instances of alleged misconduct by APL. For example, APL originally quoted G-10 a price of $7,240 to store its fourth shipment of resin in Los Angeles. However, G-10 claims that APL raised the price to $37,819 after G-10 filed the instant lawsuit. Also, after

this lawsuit was filed G-10 found a buyer in Jakarta, Indonesia for the fourth shipment of resin. APL told G-10 that there was no published rate to Jakarta, and that it would cost $133,000 to ship 100 metric tons, considerably more than the shipment itself was worth. In an attempt to prove discrimination, G-10 asked an associate in the industry, Sandra Renner, to obtain a quote from APL to send the identical amount of resin to Jakarta. G-10 presented evidence that APL advised Renner there was a published rate to Jakarta, and that it would cost $13,900 to ship 100 metric tons.

B.

G-10 filed this action against APL in a Minnesota state court on July 2, 1990. Soon after G-10 filed its complaint, APL removed the case to federal court in Minnesota under 28 U.S.C. §1332, basing jurisdiction on diversity of citizenship. G-10 then filed an amended complaint in which it sought damages of $3,536,000 for negligence and negligent or intentional misrepresentation.

In its answer APL pled several affirmative defenses under the United States Carriage of Goods by Sea Act (COGSA), 46 U.S.C. App. §1300-1315 (1988). As one defense, APL cited the COGSA statute of limitations that provides, "the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered. . . ." COGSA §1303(6). APL claimed that it delivered all of G-10's resin between September 15 and November 15, 1988, but that G-10 did not file suit until July 2, 1990, more than one and one-half years after the last shipment of the goods.

G-10 moved for partial summary judgment on APL's affirmative defenses, which the district court granted. The district court agreed that APL could extend COGSA contractually by inserting appropriate language in a bill of lading. The court struck APL's affirmative defense of limitations, however, after finding that APL delivered its bill of lading to G-10 only after G-10's goods were shipped and that G-10, an inexperienced shipper, was unaware of the contractual extension of COGSA in APL's bill of lading.

Midway through a five week trial, G-10 moved the court for permission to amend its pleadings to claim punitive damages. The district court refused, stating that G-10's evidence against APL was "circumstantial" and did not show "clear and convincing evidence of deliberate disregard for the plaintiff's rights or safety." The district court also rejected G-10's request to instruct the jury on punitive damages. After three days of deliberation, the jury returned a verdict in G-10's favor for $500,000, but also specifically found that APL did not commit fraud, and that G-10 owed APL almost $13,000 in unpaid freight for the first resin shipment to Whampoa.

II.

In its cross-appeal APL seeks reversal of the district court's denial of its motion for summary judgment on the basis of limitations. Inasmuch as some or all of the remaining issues will become moot if we determine that G-10's suit was barred by limitations, we consider that question first, reviewing the district court's decision *de novo*. See *Cox v. Mid-American Dairymen, Inc.*, 13 F.2d 272, 274 (8th Cir. 1993).

A.

Two federal statutes set forth the rights, duties and obligations of shippers and carriers of cargo by sea. Congress enacted the Harter Act, 46 App. U.S.C. 190-196 (1988), in 1893. It governs shipments between "ports of the United States and foreign ports," and applies to the entire period that a carrier has possession of a shipper's goods, from prior to loading until after discharge. The Act contains no limitations period and specifically prohibits a carrier from inserting into its bill of lading a general release from negligence. However, carriers may "impose a limitations period on all claims against them for negligence, without violating the Act, so long as the time period specified is reasonable." *Ins. Co. of North America v. Puerto Rico Marine Management, Inc.*, 768 F.2d 470, 473 (1st Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986).

Congress enacted COGSA, which also defines rights, responsibilities and liabilities of carriers of goods by sea in 1936. COGSA represented the American enactment of the Hague Rules, which resulted from efforts in the 1920s to bring about uniformity and simplification of bills of lading used in international trade. *Union Ins. Society of Canton v. S.S. Elikon*, 642 F.2d 721, 723 (4th Cir. 1981). Unlike Harter, COGSA contains a one year statute of limitations for "all liability in respect of loss or damage" to goods shipped internationally. COGSA §1303(6). COGSA supersedes the Harter Act only with regard to the time a shipper's goods are on board a carrier's ship. COGSA §1311. Since by its terms COGSA applies only to the period between loading and discharge, it does not apply of its own force in a case like the present one, which involves an alleged loss of and damage to G-10's resin after APL unloaded it in China. If COGSA does not apply, then the Harter Act controls and there is no statute of limitations applicable to G-10's claims.

With respect to the first two shipments, APL concedes that COGSA does not itself apply because G-10's claims clearly arise from events occurring after its resin was unloaded from APL's ship. However, the terms of COGSA may be contractually extended by a carrier's bill of lading. COGSA §1307; *Colgate Palmolive Co. v. S/S Dart Canada*, 724 F.2d 313, 315 (2d Cir. 1983), *cert. denied*, 466 U.S. 963 (1984). Thus APL correctly states that it can extend COGSA's one year statute of limitations to the period after discharge of goods, thereby superseding the Harter Act and preventing G-10 from suing more than a year after injury. *Ins. Co. of North America v. Puerto Rico Marine Management, Inc.*, 768 F.2d 470, 475 (1st Cir. 1985) (bill of lading similar to APL's extends one year statute of limitations to injury arising after discharge), *cert. denied*, 474 U.S. 1102 (1986); *Firestone Tire & Rubber Co. v. Almacenes Miramar, Inc.*, 452 F. Supp. 670 (D.P.R.), *aff'd*, 588 F.2d 817 (1st Cir. 1978) (COGSA's one year statute of limitations supersedes Harter Act and controls where bill of lading extends COGSA to period after discharge).

APL inserted the extended terms of COGSA into its bills of lading under a "clause paramount," which states that

> [t]he receipt, custody, carriage and delivery of the Goods are governed by the provisions of the transportation agreement evidenced hereby and incorporated by reference, including . . . (iii) the provisions of the U.S. Carriage of Goods by Sea Act, 1936, ("COGSA"). . . . [which] shall be extended to apply . . . before the Goods are loaded on and after they are discharged from the vessel, and throughout the entire time during which the Carrier is responsible for the Goods under the transportation agreement.

B.

APL completed the bill of lading for the first shipment the day following loading and sent it by overnight mail to G-10. Although the president of G-10 denied receiving it until late September, the record belies this claim; the president negotiated the bill of lading at a bank on July 22. Since a carrier may extend the provisions of COGSA to the post-discharge period by incorporating COGSA into its bill of lading, APL argues that G-10 was bound by the terms of the "clause paramount." Even though G-10 had the bill of lading in hand immediately after the ship was loaded and sailed, it waited more than fifteen months after the cargo should have been delivered before bringing suit. Thus, APL asserts, this action was time-barred.

APL did not make out the bill of lading for the second shipment until after the shipment arrived in Hong Kong, and we cannot determine from the record when, if ever, this bill of lading was delivered. The bill of lading for this shipment is APL's standard bill, similar to the one used for the first shipment. The record contains no information about the bill of lading issued for transshipment from Hong Kong to Shanghai. APL gave its bill of lading number in answers to interrogatories, but it is not clear whether it was a standard APL bill of lading or one issued by the coastal carrier that moved the resin to Shanghai.

APL argues that the majority of courts that have addressed the issue have found shippers bound by the terms of COGSA so incorporated and extended, and that this court should contribute to uniformity in admiralty law by reversing the district court. APL argues that the two decisions relied upon by G-10 are "inapposite." We will discuss those cases more fully in our analysis of the issue. See *Encyclopedia Britannica, Inc. v. SS Hong Kong Producer*, 422 F.2d 7 (2d Cir. 1969), *cert. denied*, 397 U.S.

964 (1970), and *Allstate Insurance Co. v. International Shipping Corp.*, 703 F.2d 497 (11th Cir. 1983).

In addition to contending that G-10 had actual notice that the incorporated COGSA provisions required suit to be commenced within one year, APL argues that G-10 had constructive notice of this fact. APL issued its standard long form bill of lading to G-10. There was nothing "hidden or ingenious" in the bill and the clause paramount is not "unusual," according to APL. Because this bill of lading was on file with the Federal Maritime Commission (FMC), and available to all shippers, APL maintains that G-10 had constructive notice of its provisions.

C.

G-10 counters these arguments with the straightforward assertion that the Harter Act, which contains no statute of limitations, applies to the facts of this case. In the absence of a statute of limitations, suit would be time-barred only by application of the equitable doctrine of laches. APL did not plead or attempt to prove the elements of laches, and the district court correctly did not consider that defense. Furthermore, G-10 says, it brought suit within a reasonable time.

G-10 contends that only a bilateral agreement between a shipper and a carrier can restrict the shipper's rights under the Harter Act, and that APL acted unilaterally in attempting to extend COGSA's provisions, through its bill of lading, to the post-discharge period. Under the Harter Act, a shipper must have knowledge of a carrier's attempt to limit its rights and a "fair opportunity" to respond. G-10 asserts that it had no opportunity to object to the incorporation of extended COGSA rights into APL's bill of lading because APL did not deliver its bills

until after the ships containing G-10's goods departed. According to G-10, a carrier's failure to deliver a bill of lading prior to departure of the ship bearing the shipper's cargo renders the terms of the bill "legally ineffective."

III.

We must determine, on the facts of this case, the proper effect to be given to APL's incorporation of extended COGSA provisions by reference in the bills of lading issued to G-10.

A.

A bill of lading is a contract of adhesion that is strictly enforced against the carrier. *Mori Seiki USA, Inc. v. M.V. Alligator Triumph*, 990 F.2d 444, 448 (9th Cir. 1993). One purpose of COGSA is "to protect shippers from the overreaching of carriers through contracts of adhesion and to provide incentive for careful transport and delivery of cargo." *Cameco, Inc. v. S.S. American Legion*, 514 F.2d 1291, 1300 (2d Cir. 1974). When COGSA is inserted into a carrier's bill of lading it becomes a contractual term subject to the same interpretive rules to which any contractual clause is susceptible. *Colgate*, 724 F.2d at 315.

The District court found that G-10 did not have sufficient notice of the contractual terms placed in APL's bills of lading, not having received copies until after the goods were loaded and out of G-10's control. Although the parties disagree as to when G-10 finally acquired the bill of lading for the first shipment, it is clear that it was not until after G-10's resin was loaded for shipment to China. As stated, according to APL's answers to interrogatories, it did not issue the bill of lading for the second shipment until the ship bearing the resin had left port in the United

States and actually arrived in Hong Kong. COGSA only applies to the post-discharge stage if the parties contractually agree to allow it to do so. Thus the critical question in this case is whether G-10 agreed to the extension of COGSA's provisions, including the 1-year limitations period, to include the post-discharge stage. See *Davis Elliott International, Inc. v. Pan America Container Corp.*, 705 F.2d 705, 708-09 (3d Cir. 1983) (summary judgment for carrier reversed to give shipper an opportunity to prove that it never agreed to apply COGSA to preloading stage). Included in this inquiry is the further question whether, once it received the bill of lading, G-10 had a "fair opportunity" to object to APL's attempt to extend the limitations provision to cover the post-delivery stage. *Mori Seika USA, Inc. v. M.V. Alligator Triumph*, 990 F.2d 444, 448-49 (9th Cir. 1993); *Caterpillar Overseas, S.A. v. Marine Transport, Inc.*, 900 F.2d 714, 719 (4th Cir. 1990).

B.

The parties center their attention on *Encyclopedia Britannica, Inc. v. SS Hong Kong Producer*, 422 F.2d 7 (2d Cir. 1969), *cert. denied*, 397 U.S. 964 (1970). In *Britannica*, 1300 cartons of books were damaged when a carrier stowed the books on deck for transport. The carrier issued the shipper, Britannica, a "short form" bill of lading that contained little information but notified Britannica where it could obtain a long form bill of lading. The long form bill of lading included a provision allowing the carrier to store goods on deck absent a specific request to the contrary by the shipper. Importantly, the short form bill of lading was issued *after* the delivery of the goods. Also Britannica was not notified of the provisions in the bill of lading prior to shipment, had no previous dealings with the carrier, and had never seen the carrier's bill of lading.

After studying the historical backdrop of the Harter Act and COGSA, the Court of Appeals found that the bill of lading was not binding on Britannica. The court noted that COGSA was meant to alleviate the problems associated with hidden bill of lading terms and that "it is impractical for a shipper to be compelled to make a detailed study of all of the fine print clauses of the carrier's regular bill on each occasion *before it ships out a package.*" *Id.* at 14 (emphasis added). The court found that the carrier was estopped from asserting its rights under the bill of lading because it was not issued until after the goods were loaded, making it impossible for Britannica to notify the carrier prior to delivery of a desire to have the goods stored beneath the deck. *Id.* at 16-17.

We have no doubt that *Britannica* was correctly decided under its facts. The only way Britannica could have objected in time to insist that the books be stored below deck was prior to shipping them out. Thus, the timing of the delivery of the bill of lading was critical. Because the carrier did not deliver a bill of lading until it was too late for the shipper to rectify the situation, the shipper did not have a fair opportunity to protect its goods. We do not believe, however, that *Britannica* stands for the proposition that a bill of lading sent to a shipper after the shipper's goods are loaded is never effective to delineate the terms and conditions of the passage of goods.

G-10 also places heavy reliance on *Allstate Ins. Co. v. International Shipping Corp.*, 703 F.2d 497 (11th Cir. 1983). Like *Britannica*, *Allstate* involved a shipper's claim for damages caused by a carrier's handling of cargo. In *Allstate*, the shipper loaded goods in sealed container trailers for delivery to the carrier. A freight forwarder delivered the containers to a carrier that did not ship containers or trailers, and opened the sealed containers prior

to shipment. The defendant freight forwarder never notified the shipper of the carrier's policy of unloading sealed containers. After unloading the containers, the carrier left the shipper's goods out in the weather and they arrived at their destination in a damaged condition. The district court found that the goods were damaged as a result of exposure to the elements prior to loading on board the ship and awarded damages to Allstate, the shipper's insurer and subrogee.

The court of appeals affirmed, finding that the short form bill of lading delivered to the shipper contained no indication that the shipper was bound by a statute of limitations. The carrier relied on the fact that the short form bill incorporated by reference both COGSA and the carrier's long form bill of lading that was on file with the FMC. The long form bill of lading contained a specific provision requiring the shipper to bring suit within one year of the delivery of the goods (COGSA's limitations provision did not apply because the injury to the goods occurred before shipment, and there was nothing in the bill to extend this provision to the pre-loading and post-delivery stages).

The Court of appeals rejected the carrier's claim of constructive notice and found that the shipper did not have actual knowledge of the terms contained in the long form bill. The court stated:

> [W]e are reluctant to give effect to limiting clauses with which "a carrier could shield itself from liability through manipulation of fine print clauses contained in standardized forms." *Calmaquip Engineering West Hemisphere Corporation v. West Coast Carriers Ltd.*, 650 F.2d 633, 639-40 (5th Cir. Unit B 1981) *citing Encyclopedia Britannica, supra* at 14. In this regard we follow the Second Circuit's decision in *Encyclopedia Britannica, supra*; we will not limit the

> period within which Allstate could bring suit when that limit was expressed in fine print in a document never specifically brought to Allstate or Alumax' attention, and when neither Allstate nor Alumax had actual knowledge of its terms. *Id.* at 14.[4] This is particularly so where the limitation arguably conflicts with the absence of a specific limitations period under the Harter Act.
>
> [4] It is hard to say even International [the freight forwarder] had knowledge actual or constructive, inasmuch as the district court found International received the bills of lading *after* the ISLA DEL SOL sailed. (emphasis in original).

Id. at 500.

There are several obvious differences between the present case and *Allstate*. First and most important is the fact that the only document ever given to the shipper in *Allstate* was the short form bill of lading, which contained no reference to limitations. The carrier never supplied the long form bill, which specifically set forth the requirement that suit be brought within one year. In the present case, on the other hand, APL did deliver the bill of lading for the first shipment within a few days after loading, and that bill not only adopted COGSA and extended its provisions to the post-delivery period, but also contained a separate paragraph, titled "TIME FOR SUIT" which stated unequivocally that the carrier would be relieved of all liability unless suits were brought within one year after delivery of the goods, or after the time they should have been delivered. Second, the carrier in *Allstate* did not deliver even the short form bill until after the ship had sailed. The situation was similar to that in *Britannica*. By the time the short form bill was delivered the goods had already suffered injury and the shipper had no knowledge that they had been removed from the sealed containers and left exposed to the elements.

We believe *Britannica* and *Allstate* were correctly decided, but provide guidance on the effect of incorporating COGSA into bills of lading delivered after goods are loaded only for those cases in which the damage to goods occurs before the shipper has knowledge of an act of the carrier resulting in the damage and no fair opportunity to protest, cancel the agreement, or otherwise protect itself from the consequences of the carrier's acts.

In the present case, the goods in the first shipment were misplaced and ultimately damaged by mishandling after the voyage ended and long after the shipper received the bill of lading. Furthermore, G-10 knew the facts on which it based its claims related to the first shipment very soon after it was shipped. The president of G-10 flew to China in November of 1988, located the "lost" goods and found some of them damaged after being removed from sealed containers and left in a place where someone ripped open bags of resin. At this time G-10 had the bill of lading with its limitations provision in hand.

Although for some unexplained reason APL did not complete the bill of lading for the second shipment until the resin had been discharged in Hong Kong, if G-10 knew of the limitations provision, agreed to it and had a fair opportunity to avoid the detrimental effect of the limitations period, it was bound by this provision.

IV.

Although a bill of lading is a contract of adhesion, the language in APL's bills is clear and we can only interpret it to mean what it says. Because it is undisputed that a carrier may alter the balance created by the Harter Act to the extent of creating a statute of limitations for suit by a shipper, the only issues are whether G-10 agreed

to the limitations provision in the bills of lading and whether it had a fair opportunity to relieve itself of the burden on its rights thus created.

A.

Contrary to G-10's assertion, the bill of lading for the first shipment was not a "unilateral" alteration of the agreement between it and APL of which it had no notice. Two days after the first shipment was loaded, G-10 negotiated the bill of lading at a Minnesota bank. An export negotiator at the bank testified that the original bill, introduced into evidence by APL, contained the typewritten legend "Gamma-10 Plastics, Inc.," followed by a signature line containing the signature of G-10's president. A true copy of the bill of lading containing the typed legend and signature appear in APL's appendix. From this evidence we conclude that G-10 accepted the contents of the bill of lading as part of its agreement with APL. Otherwise, it could not have negotiated the bill.

We turn now to whether G-10 had a "fair opportunity" to relieve itself of the burden placed on its right to recover from APL for loss and damage to the first two shipments created by the statute of limitations. The court in *Mori Seiki* described the Ninth Circuit's treatment of this issue as follows:

> In a dispute over "fair opportunity" such as this one, the carrier bears an initial burden of producing prima facie evidence which demonstrates that it provided such notice to the shipper. * * * Normally, the carrier can meet this initial burden by showing that the language of COGSA Section 4(5) [liability limitation] is contained in the bill of lading. * * * Language in the bill of lading "to the same effect" as the statute is adequate. * * * On the other hand, the mere incorporation of COGSA by reference is not adequate.

> * * * Once the carrier meets this initial burden, the burden of disproving fair opportunity [shifts] to the shipper.

990 F.2d at 449 (citations and quotation marks omitted).

Applying this analysis, we conclude that APL carried its initial burden with respect to the first shipment, and that G-10 failed to carry its burden of disproving fair opportunity. G-10 knew of APL's alleged derelictions with respect to this shipment, and in fact knew the extent of its injury at a time when it had received and accepted the bill of lading. Yet, it waited until after the limitations period described in the bill had expired before bringing suit. This is not a case where the bill of lading was delivered too late for the shipper to take action to avoid detriment arising from conditions first disclosed by the contents of the bill.

The record is quite different with respect to the second shipment. The record contains a copy of the front of the bill of lading, but there is no signature or other indication that anyone accepted or negotiated this bill on behalf of G-10. The record does reveal that the bill was not prepared until after APL's ship bearing the resin had reached Hong Kong, and it is silent as to when the bill of lading was delivered to G-10. We conclude that APL failed to carry its burden of proving that G-10 had notice and a fair opportunity to avoid the consequences of the attempted inclusion of a statute of limitations for claims arising from post-delivery damage to the goods. The district court properly denied APL's defense of limitations with respect to the second shipment.

B.

The facts of the third and attempted fourth shipments are unlike those surrounding the first two. Although the

record shows that APL issued a bill of lading for the third shipment, the record is silent as to when, if ever, this bill of lading was delivered to G-10. Thus, APL failed to carry its burden of showing that G-10 had notice of the provisions incorporating and extending COGSA's statute of limitations or that G-10 ever accepted those terms. The district court correctly denied APL's defense of limitations to the extent it applied to the third shipment. Since APL held the last four containers and never shipped them, there was no bill of lading. Because COGSA applies only "tackle to tackle" and these containers were never loaded on a ship, G-10 was entitled to go forward with its claims of negligence and negligent or intentional misrepresentation insofar as they applied to claims based on APL's mishandling of these four containers.

C.

We reject APL's contention that filing a bill of lading with the FMC gives a shipper constructive notice and binds the shipper to all conditions set forth in the bill of lading. We agree with the *Allstate* court and others that have held filing with the FMC gives a shipper notice only of the tariff. Limitation of liability provisions are not related to rates or charges and are not required to be included in the tariff. *Marvirazon Compania Naviera, S.A. v. H.J. Baker & Brothers*, 674 F.2d 364, 366 n.1 and 2 (5th Cir. 1982) (quoted in *Allstate*, 703 F.2d at 500).

V.

Inasmuch as a new trial is required on G-10's claims related to the second, third and fourth shipments, we consider next G-10's principal contention on appeal—that the

district court abused its discretion in denying G-10's motion to amend its complaint to include a claim for punitive damages.

A.

The district court found that G-10 could potentially recover punitive damages under either federal maritime law or Minn. Stat. §549.191. Under maritime law, punitive damages are warranted where the defendant has acted with "reckless or callous disregard for the rights of others or for conduct which shows gross negligence or actual malice or criminal indifference." *Churchill v. F/N Fjord*, 892 F.2d 763, 772 (9th Cir. 1988), *cert. denied*, 497 U.S. 1025 (1990); See also *Complaint of Merry Shipping, Inc.*, 650 F.2d 622, 625 (5th Cir. 1981) (punitive damages warranted where defendant acts "willfully and with gross disregard for the plaintiff's rights").

In Minnesota, a plaintiff makes a prima facie case for punitive damages by establishing "clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others." Minn. Stat. §§549.19, 549.20. A defendant operates with "deliberate disregard" by acting with intent or indifference to threaten the rights or safety of others. *Id.* A plaintiff may not place a claim for punitive damages in its original complaint, but must make a motion to amend its pleadings to include punitive damages. Minn. Stat. §549.191. This policy was enacted to prevent frivolous punitive damage claims by allowing a court to determine first if punitive damages are appropriate. *Bougie v. Sibley Manor, Inc.*, 504 N.W. 2d 493, 499 (Minn. App. 1993). The trial court has discretion in allowing a plaintiff to amend its complaint to assert punitive damages, *Robert Utecht v. Shopko Dept. Store*, 324 N.W.2d 652, 654 (Minn. 1982), but "may not allow an

amendment where the motion and supporting affidavits do not reasonably allow a conclusion that clear and convincing evidence will establish the defendant acted with willful indifference . . . ." *Swanlund v. Shimano Industrial Corp., Ltd.*, 459 N.W.2d 151, 154 (Minn. App. 1990).

The district court gave the following explanation for its denial of G-10's motion to amend its complaint to include a claim for punitive damages:

> [G-10's] assertions provide at best only circumstantial evidence that APL acted recklessly, willfully, deliberately or with gross disregard for gamma-10's rights. APL could have committed all of the alleged acts with mere indifference to plaintiff's rights, thus the Court concludes that gamma-10 has not established a prima facie case by clear and convincing evidence under Minnesota law and has failed to present sufficient evidence to warrant punitive damages under maritime law. Accordingly, gamma-10's motion for leave to amend its complaint to state a claim for punitive damages is denied.

Given Minnesota's requirement of clear and convincing evidence and the policy considerations behind Minn. Stat. §549.191, we will not disturb the district court's ruling insofar as it refused to permit the amendment and instruct the jury that G-10 could recover punitive damages under Minnesota law. The claim for punitive damages under maritime law, as the district court recognized, presents a question of federal law and disposition of the motion to amend is controlled by FED. R. CIV. P. 15.

B.

Rule 15(a) provides that leave to amend "shall be freely given when justice so requires." Rule 15(b) states that "[w]hen issues not raised by the pleadings are tried by

express or implied consent of the parties, they shall be treated in all respects as if they have been raised in the pleadings." G-10 argues that it was entitled to amend under both Rule 15(a) and (b) and that the district court abused its discretion in denying the motion.

In *Foman v. Davis*, 371 U.S. 178 (1962), the Supreme Court prescribed the proper approach under Rule 15(a) when a party makes the motion to amend pleadings:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Id. at 182.

This court has stated that a party's motion to amend should be dismissed on the merits "only if [it] assert[s] clearly frivolous claims or defenses." *Buder v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 644 F.2d 690, 695 (8th Cir. 1981). Likelihood of success on the new claim is no basis for denying an amendment unless the claim asserted therein is clearly frivolous. *Id.* at 695. Based on G-10's assertions at trial, G-10's punitive damages claim was not "clearly frivolous" and the district court should

have allowed G-10 to amend its complaint. APL's agents purportedly falsified custom applications in Whampoa, illegally emptied sealed containers full of resin onto the docks of Whampoa and Shanghai, ignored G-10's claims for lost goods, and after the goods were found refused to provide access to them. APL also mistakenly shipped goods it should not have, allegedly overcharged for storage of the mistakenly shipped goods, and misrepresented storage costs in Los Angeles and shipping costs to Jakarta.

G-10 also contends that the district court should have permitted the amendment under Rule 15(b) because APL impliedly consented to litigation of the punitive damages issue. The court encourages granting amendments to conform to evidence received during trial. An amended complaint that "merely amplifies some of the allegations that have been proven" should be allowed. *Herrera v. Valentine*, 653 F.2d 1220, 1224 (8th Cir. 1981). On the other hand, however, a district court is not required to grant a motion to amend on the basis of some evidence that would be relevant to the new claim if the same evidence was also relevant to a claim originally pled. The introduction of such evidence does "not provide the defendant any notice" that the implied claim was being tried. *Pariser v. Christian Health Care Systems, Inc.*, 816 F.2d 1248, 1253 (8th Cir. 1987).

G-10 notified APL ten days before trial that "Gamma 10 intends to move the Court for a punitive damage instruction," and the district court found that "APL was clearly on notice before trial that Gamma-10 might seek punitive damages." The court also acknowledged that APL defended against a punitive damages claim, but reasoned that it was merely a "prudent litigation strategy" for APL to protect against a possible punitive damages

claim pending the district court's ruling on the matter. The court found that APL did not impliedly consent to trying the punitive damages issue, as was evidenced by APL's opposition to G-10's motion to amend its complaint.

Several times during the trial, G-10 pointed to APL's "deliberate disregard for the rights of Gamma-10," in reference to the Minnesota standard of punitive damages. Moreover, the district court allowed an APL claims manual into evidence over the objection of APL after G-10 argued that it was relevant to the "claim for punitive damages for deliberate disregard for the rights of Gamma-10." The district court also allowed an APL employee to discuss the inaccessibility of G-10's resin in China after G-10 argued that the evidence "goes to what we will be moving for in our punitive damages instruction. . . ." Finally, in closing argument APL itself questioned whether evidence introduced at trial showed that it acted with "deliberate disregard for someone's rights." APL even admits, in its brief on appeal, that G-10's original claims included "punitive damages, because of APL's refusal to release cargo to G-10 without payment of freight and port imposed demurrage charges."

Despite G-10's references to punitive damages during trial and the notice given to APL prior to trial, APL never objected to G-10's use of punitive damages evidence. *United States v. Sci., Inc.*, 828 F.2d 671, 677 (11th Cir. 1987) (failure to object to evidence raising issues outside of pleadings constitutes implied consent). In fact, the district court found that APL defended against G-10's punitive damages claim. See *Herrera*, 653 F.2d at 1223-24 (where defendant introduces evidence in opposition to claim, issue is litigated by consent).

C.

We believe that the district court denied the motion to amend by weighing the likelihood of success on the punitive damages claim. The court found that the evidence offered by G-10 in support of punitive damages was "circumstantial" but it did not address the requirements of Rule 15. We conclude that Rule 15 required the court to grant G-10's motion unless the evidence was clearly insufficient under maritime law to support a claim for punitive damages. G-10 put APL on notice early in the proceedings that it sought punitive damages. Further, at several points during the trial, counsel for G-10 argued with respect to proffered evidence that such evidence went to the question of punitive damages. Although some of the evidence related to G-10's breach of contract claim as well as a claim supporting punitive damages, the complaint charged APL with the torts of negligence and negligent or intentional misrepresentation and G-10 introduced evidence of conduct by APL that was relevant only to those claims. Throughout the trial G-10 sought to show that APL had acted with deliberate disregard for its rights and had acted maliciously toward it.

It is well settled that punitive damages may be recovered under general maritime law "for conduct which manifests reckless or callous disregard for the rights of others or for conduct which shows gross negligence or actual malice or criminal indifference." *Churchill v. F/V Fjord*, 892 F.2d 763, 772 (9th Cir. 1988), *cert. denied*, 497 U.S. 1025 (1990) (citation and interior quotation marks omitted). While admiralty law does not permit an award of punitive damages for breach of contract, it does permit such damages where the defendant's actions constitute an independent tort in addition to being a breach of contract.

Thyssen, Inc. v. S.S. Fortune Star, 777 F.2d 52, 62-63 (2d Cir. 1985) (citing Restatement (Second) of Contracts §355 (1979)).

On the record before us we conclude that the district court abused its discretion in denying G-10's motion to amend the complaint to include a claim for punitive damages. G-10 made the denial one of its bases of its motion for a new trial. Upon remand, the district court will grant a new trial on the claims related to the second, third and fourth shipments of resin. If the evidence concerning APL's allegedly tortious conduct is substantially the same as the first trial, the district court will instruct the jury on G-10's claim for punitive damages under maritime law.

VI.

The remaining issues raised on appeal require little discussion.

We find no abuse of discretion in the district court's evidentiary rulings. We cannot anticipate situations that may arise at another trial requiring rulings on evidentiary matters. If evidentiary questions are raised at a second trial, however, the experienced trial judge will again exercise his discretion in disposing of them.

Likewise, we find no abuse of discretion in the trial court's denial of attorney fees. Attorney fees generally are not allowed in admiralty cases absent a showing that the losing party acted in bad faith. *Goodman v. 1973 26 Foot Trojan Vessel*, 859 F.2d 71, 74 (8th Cir. 1988). The district court found that APL was not guilty of bad faith and we will not disturb that finding.

The district court awarded G-10 prejudgment interest. We find the court's method of calculating prejudgment

interest and the rate applied reasonable. If the jury awards G-10 damages at a second trial, the district court may award prejuducial prejudgment interest on the same basis that it made the calculations following the first trial.

CONCLUSION

The judgment of the district court is affirmed in part and reversed in part. The case is remanded for a new trial and such further proceedings as may be required, consistent with this opinion.

APPENDIX B

[Dated July 20, 1992]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Cv. No. 3-90-428

Gamma 10 Plastics, Inc., Plaintiff,

vs.

American President Lines, Ltd.
and American President Companies, Defendants.

ORDER

The above-entitled matter came before the Court on June 5, 1992, upon the motion of plaintiff Gamma 10 Plastics, Inc. for partial summary judgment dismissing five of the affirmative defenses of defendants. Scott A. Johnson appeared on behalf of the plaintiff. Michael Snyder appeared on behalf of the defendants.

Based upon the arguments of counsel, all facts, files, and records herein, the Court HEREBY ORDERS that the motion of plaintiff Gamma 10 Plastics, Inc. for partial summary judgment is GRANTED and the affirmative defenses set forth in paragraphs a, b, c, d, and e of defendants' Answer to the amended complaint are DISMISSED.

DATED: July 20, 1992.

/s/ Robert G. Renner, Senior Judge
United States District Court

MEMORANDUM

Background

This dispute arises from a shipping agreement between plaintiff Gamma 10 Plastics, Inc. and defendant American President Lines, Ltd., a subsidiary of defendant American President Companies.

Plaintiff is a Minnesota corporation which manufactures plastic resin pellets. Defendant is a Delaware corporation involved in the shipping and container distribution business. In the summer of 1988, plaintiff contracted with defendant to deliver containers of plastic resin pellets to the People's Republic of China. Between July and October of 1988, defendant transported three shipments of plaintiff's pellets to China.

The first shipment was loaded onto defendants' vessel in Seattle, Washington, on July 20, 1988. The next day, defendant issued a bill of lading, numbered 155769, for this shipment. This bill of lading, and the subsequent bills of lading for the other shipments, all contained clauses limiting the remedies available to plaintiff and the time within which plaintiff could bring suit.

The parties sharply disagree about when plaintiff received the original bill of lading. However, they agree that it was sent by mail no earlier than the date it was issued, July 21, 1988. The parties also agree that defendant filed a copy of the bill of lading as part of its tariff with the Federal Maritime Commission.

Each shipment of plaintiff's resin was discharged in Hong Kong and subsequently transported to the People's Republic of China. Plaintiff asserts that defendant then lost the resin, and that it was not located until three months later when the president of Gamma 10 Plastics,

Joseph Kopstein, traveled to Whompoa. He says that he found the goods in a deteriorated condition, removed from their sealed containers and lying exposed to the elements under a canopy on the dock. Plaintiff alleges that the delay and the deterioration of the resin caused the buyer to cancel its supply contracts for future years, which were worth tens of millions of dollars to plaintiff.

Defendants reject this version of the facts. They maintain that the goods sat on the dock because the buyers rejected them, finding them to be of inferior quality.

Plaintiff moves for dismissal of five affirmative defenses set forth in paragraphs a, b, c, d, and e of defendants' Answer to the amended complaint. These affirmative defenses are all based upon clauses in the bills of lading and sections of the Carriage of Goods by Sea Act ("COGSA"), 42 U.S.C. §§ 1301-1315. The following is a summary of these defenses:

a) the complaint is time barred, according to Clause 24 of the bills of lading and 46 U.S.C. § 1303;

b) defendant's liability is limited to $500.00 per package and/or freight unit, pursuant to Paragraph 4 of the bills of lading 46 U.S.C. § 1304(5);

c) paragraph 11 of the bills of lading allows for transshipment or substitution of the vessel;

d) defendant is not liable for consequential damages due to late delivery, under paragraph 12 of the bills of lading; and

e) delivery to a forwarding agent, carrier, warehouse, or storage facility constitutes complete delivery, under paragraph 13 of the bills of lading.

Analysis

COGSA "applies of its own force only to the period while the goods are actually on board the vessel . . ." Defendants' Memorandum in Opposition, p. 20; 46 U.S.C. § 1301(e). The earlier Harter Act, codified at 46 U.S.C. § 190, *et seq.* governs the period after the discharge of the goods. 46 U.S.C. § 1311. COGSA provides, in part:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect.

46 U.S.C. § 1303(8). Courts have used this section to strike down clauses in bills of lading that limit the responsibilities of carriers during the carriage of goods. *Encyclopedia Britannica, Inc. v. SS Hong Kong Producer,* 422 F.2d 7 (2nd Cir. 1969).

The affirmative defense set forth in paragraph c of the Answer relies upon terms in the bills of lading which purport to alter the obligations and liabilities of the carrier during the period between loading and discharge. This defense is invalid under COGSA, 46 U.S.C. § 1303(8).

The other defenses pertain to defendants' conduct after they discharged the goods from their vessel. As to these defenses, the issue is whether the parties contracted to make the terms of COGSA govern post-discharge conduct. Section 1307 of COGSA allows parties to enter into such contracts:

> Nothing contained in this chapter shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the

> ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

Accordingly, it has been held that parties may contractually extend COGSA's application to the period after discharge, but when they do so, COGSA applies merely as a contractual term. *Colgate Palmolive Co. v. S/S Dart Canada*, 724 F.2d 313 (2nd Cir. 1983), *cert. denied*, 466 U.S. 963. Other principles of contract law still govern the efficacy of such an attempt to insert terms into a contract. *Id.*

The bills of lading purport to extend COGSA to post-discharge conduct, but plaintiff contends that the liability limitations contained in the bills of lading are not binding, because the bills of lading were delivered to plaintiff after the goods had been shipped.

Many courts, as well as Congress, have noted the great inequality in bargaining power between shippers and carriers. Consequently, some courts have held that a carrier is estopped from invoking an exculpatory clause in a bill of lading which is issued to the shipper after his goods are shipped, where the clause is not brought to the attention of an inexperienced shipper. *See, e.g.*: *Encyclopedia Britannica, Inc. v. SS Hong Kong Producer*, 422 F.2d 7 (2nd Cir. 1969). The filing of the bill of lading with the Federal Maritime Commission has no effect on this rule. *Allstate Insurance Co. v. International Shipping Corp.*, 703 F.2d 497 (11th Cir. 1983).

Defendants have not cited any cases refuting or distinguishing *Encyclopedia Britannica* and the numerous cases following it. During argument, defendants referred to several cases not cited in its briefs, yet none of these cases limited the holding of *Encyclopedia Britannica*. *Huosong*

(America), Inc. v. American President Lines, Ltd., 773 F.Supp. 577 (S.D.N.Y. 1991); *Seguros "Illimani" et al. v. M/V Popi, P, her Engines, et al.*, 735 F.Supp. 108 (S.D. N.Y. 1990), *aff'd* 929 F.2d 89 (2nd Cir. 1991); *Miller Export Corp. v. Hellenic Lines, Ltd.*, 534 F.Supp. 707 (S.D. N.Y. 1982).

The Court concludes that the clauses in the bills of lading designed to extend COGSA to the period after discharge are ineffective, because plaintiff, an inexperienced shipper, was not adequately apprised of these clauses prior to the shipment of the goods.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Gamma 10 Plastics, Inc. Case No. Civil 3-90-428

vs. JUDGMENT IN A CIVIL CASE

American President Lines, Ltd.
and American President Companies, Ltd.

(×) Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

( ) Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is in favor of plaintiff in the amount of $500,000 and against defendants and judgment is in favor of defendants in the amount of $12,769.98 and against plaintiff.

DATE: JUL 19, 1993

FRANCIS E. DOSAL, CLERK

Denise La Fond, Deputy Clerk

/s/ Robert G. Renner, Judge
U.S. District Court

APPENDIX D

[Filed December 17, 1993]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-90-428

Gamma-10 Plastics, Inc.,

Plaintiff,

v.

American President Lines, Ltd.
and American President Companies, Ltd.,

Defendants.

ORDER

Plaintiff Gamma-10 Plastics, Inc. moves for prejudgment interest on its verdict of $500,000 against American President Lines, Ltd. and American President Companies, Ltd. (collectively APL). The court awards Gamma-10 $308,417.

I. Background

Gamma-10's business was selling polypropylene resin, a raw material from which plastic products are molded. Gamma-10 purchased trim left over from the production of diapers and contracted with companies known as compounders to reprocess the trim into resin pellets. Gamma-10 then sold the resin to manufacturers of plastic items.

In 1988 Gamma-10 contracted with a buyer in China, VIC International, for the sale of a quantity of resin. Gamma-10 and VIC International also had an agreement covering sales for five years into the future. Gamma-10 contracted with APL to transport the first installment of resin to China. This first installment consisted of a total of 22 twenty-ton containers in five shipments, and had a contract value of approximately $540,000. There were, to put it mildly, problems with these shipments, problems which Gamma-10 asserts led to its demise as a viable business entity.

Gamma-10 claimed that APL negligently mishandled the shipments of resin, thus preventing VIC International from taking delivery of the first installment on time. As a result, Gamma-10 argued, VIC International canceled both the order for containers Gamma-10 had already shipped, and the long-term supply agreement. Gamma-10 further asserted that it could not quickly resell the resin at a market price. It eventually did resell the 22 containers of resin, but at a price substantially below the market rate and after accruing significant storage and shipment costs. However, Gamma-10 claimed that because most of its capital was tied up for so long in shipments sitting in warehouses in China and elsewhere, it was forced to go out of business.

Gamma-10 contended at trial that it suffered $90,000,000 in damages as a result of its inability to sell the 22 containers of resin at the contract price, the loss of the long-term supply contract with VIC International, and the loss of other profits from 1988 through 1993. The jury found for Gamma-10 on its negligence claim, but awarded only $500,000 in damages. Following the verdict, Gamma-10 moved for prejudgment interest.

II. Discussion

The Court has previously addressed Gamma-10's entitlement under Eighth Circuit precedent to prejudgment interest. In an admiralty action such as this one, a prevailing plaintiff is entitled to prejudgment interest " 'unless there are exceptional or peculiar circumstances.' " *United States v. American Commercial Barge Line Co.*, 988 F.2d 860, 863 (8th Cir. 1993) (quoting *Mid-America Transportation Co. v. Rose Barge Line*, 477 F.2d 914, 916 (8th Cir. 1973)). Because APL failed to cite any relevant exceptional or peculiar circumstances, the Court held that there were no grounds for denying Gamma-10's motion.

All that remains is the calculation of the amount of interest to which Gamma-10 is entitled. Determining the amount of prejudgment interest is a factual inquiry to be resolved on the basis of the evidence presented to the court. *See Ohio River Co. v. Peavy Co.*, 731 F.2d 547, 549-50 (8th Cir. 1984). Because the parties' initial memoranda did not lay a sufficient evidentiary foundation for a determination of the interest to be assessed, the Court requested that the parties submit supplemental memoranda on the amount and period over which to assess interest, the interest rate, and the frequency of compounding.

A. Amount Against and Period Over Which to Assess Interest

The first issue is the amount of money against and the period over which to assess interest. Interest must be computed from when the claim accrues until judgment is entered. *West Virginia v. United States*, 479 U.S. 305, 310 n.2 (1987). At trial Gamma-10 claimed damages both from the loss of the sale of the 22 containers of resin it entrusted to APL, and from the loss of profits from 1988 to 1993.

Gamma-10's claim for the loss of the resin arose on the date Gamma-10 would have received payment under the contract with VIC International. Therefore, any part of the jury's award that is compensation for that claim should accrue interest from that date. But any portion of the award that reflects a loss of profits from later sales should accrue interest only from the point at which Gamma-10 would have earned those profits.

The special verdict form did not ask the jury to indicate whether it intended to award Gamma-10 damages for the loss of the 22 containers, the loss of future profits, or some combination. The size of the verdict, however, is evidence of what category of damages the jury intended to award. The amount of the judgment is close to the approximately $540,000 contract value of the shipments. The closeness of the round-figure award of $500,000 to the contract value of the shipments suggests the jury concluded that APL was responsible for Gamma-10's loss on the 22 containers of resin, but not any loss of future profits. Moreover, the jury could not reasonably have concluded that APL handled the resin shipments non-negligently, but nevertheless caused Gamma-10 to lose future profits. As for the reduced price at which Gamma-10 later sold the 22 containers of resin, the jury may well have concluded that it was offset by the extra time, effort, and expense required to resell the resin. Therefore, the Court concludes that the entire amount of the jury's award represents damages Gamma-10 incurred as a result of and at the time VIC International's cancellation of the contract. Gamma-10 is thus entitled to interest on the whole amount of the judgment from the date it incurred the loss to the date the judgment was entered.

Gamma-10's claim first arose on the date it was entitled to be, but was not, paid by VIC International. Unfortu-

nately, neither party's briefs indicate what this date was. APL's brief, however, presumes that Gamma-10 incurred all of its losses under the contract on October 4, 1988, the date VIC International was to take delivery of the first shipment of resin. In the absence of more precise evidence of when Gamma-10's claim arose, the Court concludes that it is entitled to interest from October 4, 1988 to July 19, 1993, the date judgment was entered.

B. Interest Rate

The next issue is what the interest rate should be. The principal purpose of an award of prejudgment interest is to ensure that the injured party is fully compensated. *See West Virginia*, 479 U.S. at 310 n.2. Two subsidiary purposes are to prevent the wrongdoer from gaining a windfall and to remove an incentive to prolong litigation. *See General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 655 n.10 (1983). Thus, the rate applied should reflect the rate prevailing during the relevant period. *See United States v. Motor Vessel Gopher State*, 614 F.2d 1186, 1190 (8th Cir. 1980); *Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1332 (7th Cir. 1992). Determining the market rate is a factual inquiry which the court must resolve on the basis of the evidence presented to it. *Ohio River Co.*, 731 F.2d at 550.

But whose rate in which market? Neither the Supreme Court nor the Eighth Circuit Court of Appeals has addressed this issue. *See, e.g., West Virginia*, 479 U.S. at 310 n.2 (merely noting that prejudgment interest "serves to compensate for the loss of use of money due as damages"). The Seventh Circuit Court of Appeals, however, has confronted the problem. Two Seventh Circuit opinions dealing with prejudgment interest conceive of a prevailing tort plaintiff as an unwilling creditor of the defendant.

Amoco Cadiz, 954 F.2d at 1332; *Gorenstein Enterprises v. Quality Care-USA*, 874 F.2d 431, 436 (7th Cir. 1989). This perspective led the *Amoco* and *Gorenstein* courts to conclude that the appropriate rate is that which the defendant would have had to pay to borrow money during the relevant period. *Amoco Cadiz*, 954 F.2d at 1332; *Gorenstein*, 874 F.2d at 436. The premise for this conclusion is that what the defendant would have had to pay during the term of the "loan" reflects the three elements of a market rate; the social return on investment, i.e., how much it would have cost to bid money away from other productive uses; anticipated inflation during the term of the loan; and the risk of nonpayment. *Amoco Cadiz*, 954 at 1332.

The *Amoco* and *Gorenstein* courts suggested that district courts engage in either "refined rate-setting" or use the prime rate. *Amoco Cadiz*, 954 F.2d at 1332; *Gorenstein*, 874 F.2d at 436. "Refined rate-setting" would entail determining what the defendant actually would have paid to borrow money during the litigation. *Amoco Cadiz*, 954 F.2d at 1332. On the other hand, the Seventh Circuit suggested, courts could use the prime rate because it is readily ascertainable, reasonably fair approximation of a defendant's cost of funds. *Id.* The prime rate is the rate banks charge their most credit-worthy customers for short-term unsecured loans. *Id.*

Although the Seventh Circuit's approach is based on an intriguing view of the relationship between a prevailing plaintiff and a defendant, it does not always fully effectuate the purposes of an award of prejudgment interest. If the only purposes for awarding prejudgment interest were to avoid granting the wrongdoer a windfall and to remove the incentive to prolong litigation, the appropriate rate would indeed be the cost of money to the wrongdoer during the relevant period.

The primary purpose of awarding prejudgment interest, however, is to fully compensate the injured party for the loss of use of money. If the injured party could have earned more with the money than the wrongdoer would have paid to borrow it, awarding interest at the wrongdoer's rate would undercompensate the injured party. Therefore, in determining the interest rate, the aim should be to award the greater of the cost of money to the wrongdoer or the return the injured party could have earned.

To assist the court in determining the appropriate rate, Gamma-10 has offered evidence of three different types of rates: (1) the return it would have achieved had it invested the money in its own business, (2) the rate Gamma-10 would have had to pay to borrow a similar sum of money, and (3) the return Gamma-10 could have achieved by investing the money in stocks or bonds.

Gamma-10 argues that the court should base the interest award on the rate it claims it would have achieved by investing the money in its own business. Had it received the $500,000 at the time its claim arose, according to Gamma-10, it would have invested the money in its business, just as would any other prudent company under similar circumstances. Based on the extensive evidence about the operations of Gamma-10 that it heard at trial, the court has no reason to doubt this. The appropriate compensation to Gamma-10 for its loss of the use of the $500,000, therefore, would be an award of interest at the rate Gamma-10 would have earned during the relevant period.

Based on extrapolations from its activities before the ill-fated China sale, Gamma-10's expert Donald Gorowsky states that from 1988 to 1993, Gamma-10 would have achieved an average annual profit return of 31.27 per cent.

Compounded annually, Gorowsky states that this rate would yield $1,448,935 on $500,000 between July 1, 1988 and July 1, 1993.

The jury's verdict, however, precludes an award of interest based on the profits Gamma-10 would have earned by investing the amount of the judgment in its business. At trial, Gamma-10 established that shortly after the contract with VIC International fell through in 1988, it effectively ceased operations. The only significant activities Gamma-10 conducted after the contract fell through were its efforts to find a new buyer for the shipments of resin in APL's possession.

Although the jury agreed with Gamma-10's claim that APL was negligent with respect to the shipments of resin, the amount it awarded Gamma-10 was slightly less than the correct cost of the shipments of resin. Therefore, as the court has already concluded, the jury implicitly but clearly refused to award damages for any loss of future profits. This implies, in turn, that the jury concluded that Gamma-10 would have failed regardless of APL's negligence. Because Gamma-10 would have failed despite APL's negligence, it would not have shown any return on the $500,000 by the summer of 1993.

The second measure Gamma-10 suggests is the rate it would have had to pay to borrow $500,000 during the relevant period. Gamma-10 contends that because it was a new company with a short track record, it would have had to pay a commercial lender the prime rate plus 3 per cent. This measure is irrelevant because there is no evidence that Gamma-10 did or could have borrowed any money to make up for the losses associated with the APL shipment. Had Gamma-10 borrowed $500,000, an award of interest at the rate it would have paid for the loan

would, of course, very closely reflect the cost to Gamma-10 of the loss of use of the money.

The third measure, the return on an "average risk or low risk" investment, Gamma-10 argues, is a good measure of the return on an average, acceptable risk investment. This would be reflected by the performance of the Dow Jones Average of 30 Industrials, the Standard and Poors 500 Stock Index, or the Lehman Brothers Government and Corporate Bond Index over the relevant period. This measure is irrelevant because there is no evidence that had Gamma-10 been awarded the $500,000 at the time its claim arose, it would have invested the money in stocks or bonds. Indeed, Gamma-10 asserts that it would have invested the money in its own business.

Because Gamma-10 suffered no damages as a result of the loss of use of the amount of the judgment, it is entitled to interest only under the two subsidiary rationales, prevention of unjust enrichment and avoidance of incentive to delay. Under both of these rationales, the relevant measure is the cost of funds to the wrongdoer during the relevant period.

Neither side has submitted highly persuasive evidence of what APL's cost of funds was from 1986 to 1993. Gamma-10 states that, according to APL's financial statements, APL paid annual interest rates of between 10.31% and 11.05% between the date of Gamma-10's claim and the date of judgment. Gamma-10 contends that these rates reflect what APL would have paid to borrow the amount of the judgment over the relevant period. The average rate APL was paying on its existing, long-term loans during this period does not, however, necessarily reflect what it would have paid for a new, additional loan taken out in 1988.

In a late submission supported only by a letter written by its assistant treasurer, APL provides the rates it earned on excess balances from 1986 to 1992. For 1993, APL supplies its average one month rate under a revolving credit agreement, because, it states, it has been a net short-term borrower during this period. The court infers that APL is asserting that it would merely have reduced its cash reserves rather than borrow the amount of the judgment from 1988 to 1991, and that during 1993 it would have taken out a short-term loan. APL provides no evidence, however, that it had enough excess cash to do this, or that, even if it did have sufficient cash, that it would in fact have done so. The court notes, moreover, that APL's financial statements for 1990, 1991, and 1992 list as a long-term debt a note for $660,000. This suggests that APL would have treated the amount of the judgment as a long-term debt rather than reduce its cash reserves or take out a short-term loan.

The court concludes that it is more likely that APL would have taken out a long-term loan for the $500,000 rather than reduce its cash accounts by that amount or take out a short-term revolving loan. Therefore, the court will assess interest at the rates suggested by Gamma-10.

C. Compounding

Because the award of prejudgment interest in this case is based on the cost of money to APL, interest on the judgment should be compounded at the same frequency that APL would have had to make payments on a loan of $500,000. This rate of compounding would duplicate the effective interest rate to APL had it taken out a loan for $500,000 in 1988 and added the amount of interest due to the principal as the interest payments came due. In

the absence of any evidence that the interest should be compounded more frequently, the court accepts Gamma-10's annual compounding.

Using the interest rates APL paid on its outstanding loans and compounding annually, APL would have paid $308,417 to borrow $500,000 from the date Gamma-10's claim arose to the day judgment was entered. The court concludes, therefore, that Gamma-10 is entitled to $308,417 in prejudgment interest on its judgment.

Accordingly, the court GRANTS Gamma-10's motion and awards it $308,417 in prejudgment interest to be paid by APL.

Dated: December 17, 1993.

/s/ Robert G. Renner, Senior Judge
United States District Court

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Corrected Order

No. 93-3285/3286/94-1190MNST

Gamma-10 Plastics, Inc.,

Appellant/Cross-Appellee

v.

American President Lines, Ltd., et al,

Appellee/Cross-Appellant.

Appeal from the United States District Court
for the District of Minnesota

The petition for rehearing filed by the appellee American President Lines, Ltd., et al has been considered by the court and is denied.

October 6, 1994

Order Entered Under Rule 27B(a):

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
FEB 3 1995
OFFICE OF THE CLERK

No. 94-1188

In the
Supreme Court of the United States
October Term, 1994

AMERICAN PRESIDENT LINES, LTD.
and AMERICAN PRESIDENT COMPANIES, LTD.,

Petitioners,

vs.

GAMMA-10 PLASTICS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Scott A. Johnson
Counsel of Record
Todd M. Johnson
CHAMBERLAIN, NEATON & JOHNSON
445 Lake Street, Suite 303
Wayzata, Minnesota 55391
(612) 473-8444

Counsel for Respondent

1995 – Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

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QUESTION PRESENTED

In a dispute between a shipper and a carrier concerning lost and damaged cargo, may the carrier assert the statute of limitations provision of the Carriage of Goods by Sea Act incorporated into a bill of lading that was never delivered to the shipper?

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No. 94-1188

In the

Supreme Court of the United States

October Term, 1994

AMERICAN PRESIDENT LINES, LTD.
and AMERICAN PRESIDENT COMPANIES, LTD.,

Petitioners,

vs.

GAMMA-10 PLASTICS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 32 F. 3rd 1244 (8th Cir. 1994).

The district court's Order and Memorandum Opinion filed July 20, 1992, is unreported. The district court's Order and

Opinion filed December 17, 1993, is reported at 839 F. Supp. 1359 (D. Minn. 1993).

STATEMENT OF THE CASE

This case arises out of a 1988 contract between respondent, Gamma-10 Plastics, Inc.[1] and petitioner, American President Lines, Ltd. ("APL"). The contract called for petitioner to transport respondent's containers of plastic resin from the United States and deliver it to its customers at various ports in China. The resin was packed in bags, which in turn were placed by APL in 40 foot sealed containers for shipment. The controversy concerns four shipments of plastic resin: (1) five sealed containers of resin shipped to Whampoa, China in August 1988; (2) five containers shipped to Shanghai, China in October 1988; (3) six containers shipped to Hong Kong in October 1988; and (4) four containers held by APL in Los Angeles, CA after a dispute arose over the previous shipments.

APL lost respondent's first shipment of resin on the docks of Whampoa and lost the second shipment of resin on the docks in Shanghai. APL ignored respondent's written claims for lost cargo, causing respondent to search for the cargo in China itself. When the resin was finally located, it was discovered that it had been removed from the sealed containers (in violation of China port law) and many of the resin bags were ripped and the product damaged. As a result of the delay in locating the goods and their damaged condition, respondent lost its primary Chinese customer.

The third shipment was shipped to Hong Kong by APL's admitted mistake. APL not only mis-delivered the goods to Hong Kong, but stored them in a very expensive Hong Kong terminal

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[1] Pursuant to Rule 29.1 of the United States Supreme Court Rules, Gamma-10 Plastics, Inc., has no parent company and no non-wholly owned subsidiaries.

despite suggestions from APL's own employees to store the goods in free storage at a nearby APL facility in Taiwan.

The fourth shipment was held by APL in Los Angeles, and since it was never shipped, there was no bill of lading.

The respondent filed this action against APL in a Minnesota state court on July 2, 1990. APL removed the case to federal court in Minnesota under 28 U.S.C. §1332.

APL pled several affirmative defenses under the United States Carriage of Goods by Sea Act (COGSA), 46 U.S.C. app. §1300-1315 (1988). One of the defenses pled by APL was the COGSA statute of limitations that provides: "The carrier and the shipper shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered. . ." COGSA §3(6), 46 U.S.C. app. 1303(6).

The district court granted respondent's motion for partial summary judgment on APL's affirmative defenses. The district court stated that APL could extend COGSA contractually by inserting appropriate language in a bill of lading. The court, however, struck APL's affirmative defenses of limitations after finding that APL delivered its bill of lading to respondent only after respondent's goods were shipped and that respondent, an inexperienced shipper, was unaware of the contractual extension of COGSA in APL's bill of lading.

During the five-week trial, respondent moved the court for permission to amend its pleadings to claim punitive damages. The district court refused that motion as well as respondent's request to instruct the jury on punitive damages. After three days of deliberation, the jury awarded the respondent $500,000.00 in damages for APL's negligence and breach of contract and awarded APL $12,769.98 for unpaid freight on the first shipment. In post-trial proceedings, the district court awarded the respondent pre-judgment interest of $308,417.00. Both parties appealed.

The court of appeals affirmed in part and reversed in part. In ruling on APL's statute of limitations defense, the Eighth Circuit concluded that APL had sustained its burden of proof with respect to the first shipment because APL was able to prove that respondent had received an original bill of lading containing the one-year statute of limitations language and that respondent failed to carry its burden of disproving fair opportunity to take action to avoid detriment arising from the limitations language disclosed by the contents of the bill of lading.

With respect to the other shipments, the Eighth Circuit concluded that APL had not sustained its burden of proof with regard to the second and third shipments because there was no evidence in the record that established that respondent had received a bill of lading more than one-year prior to its commencement of suit. With regard to the fourth shipment (which was never shipped), there was no bill of lading, thus, there was no application of COGSA. The court of appeals also rejected APL's contention that filing a bill of lading with the Federal Maritime Commission gives a shipper constructive notice and binds the shipper to all conditions set forth in the bill of lading.

The Eighth Circuit also concluded that the district court had abused its discretion in denying respondent's motion to amend its complaint to include a claim for punitive damages. The case was remanded to the district court for a new trial on respondent's claims related to the second, third and fourth shipments of resin and its claims for punitive damages under maritime law. That trial is set to begin on April 4, 1995. Petitioner filed its Petition for Writ of Certiorari regarding the statute of limitations provisions on the last three shipments.

REASONS FOR DENYING THE WRIT

I. THE EIGHTH CIRCUIT'S OPINION DOES NOT INVOLVE THE CONFLICT AMONG THE CIRCUITS WITH REGARD TO THE "FAIR OPPORTUNITY" DOCTRINE.

Petitioner attempts to support its petition on a perceived conflict between a number of the circuit courts of appeals regarding the doctrine of "fair opportunity". However, the Eighth Circuit's opinion in this case was based on a very narrow issue having to do with the carrier's initial burden of proof, and upon that issue, there is no conflict among the circuits. This case does not present a direct conflict with any of the circuits upon the issue that formed the basis for the Eighth Circuit's opinion.

The Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. app. §1300-1315, was passed in 1936 as the American enactment of The Hague Rules, and was part of an international effort to achieve uniformity in bills of lading used in foreign trade and to redress the greater bargaining power enjoyed by carriers over shipper and cargo interests by setting out the duties and responsibilities of carriers. *Union Ins. Soc'y of Canton, Ltd. v. S.S. Elikon,* 642 F. 2d 721, 723 (4th Cir. 1981); THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW, §9-13, at 314-315 (1987).

COGSA applies to "[e]very bill of lading...which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade..." 46 U.S.C. app. §1300. COGSA is limited in application to "the period from the time when the goods are loaded on to the time when they are discharged from the ship." 46 U.S.C. app. §1301(e). Thus, COGSA applies while the goods are aboard ship, after loading and before discharge, or, as is commonly said, "tackle to tackle". The Harter Act, 46 app. U.S.C. 190-196 (1988), governs shipments between "ports of the United States and foreign ports",

and applies to the entire period that a carrier has possession of a shipper's goods, from prior to loading until after discharge. The Harter Act contains no limitations period. COGSA allows a carrier and a shipper to enter into an agreement relating to the period prior to loading and subsequent to discharge of the goods from the vessel. 46 U.S.C. app. §1307. The parties accordingly can elect to have COGSA apply during this period. *Colgate Palmolive Co. v. S/S Dart Canada*, 724 F. 2d 313, 315 (2nd Cir. 1983), *cert. denied*, 466 U.S. 963 (1984).

In the instant case, APL inserted the extended terms of COGSA into its bill of lading under a "clause paramount", incorporating by reference the COGSA one year statute of limitations with the following language:

> "[t]he receipt, custody, carriage and delivery of the Goods are governed by the provisions of the transportation agreement evidenced hereby and incorporated by reference, including...(iii) the provisions of the U.S. Carriage of Goods by Sea Act, 1936, ("COGSA")...[which] shall be extended to apply...before the Goods are loaded on and after they are discharged from the vessel, and throughout the entire time during which the Carrier is responsible for the Goods under the transportation agreement."

Respondent received the original bill of lading on the first shipment on or about July 22. The record did not establish when respondent received the original bill of lading with regard to the second and third shipments. No bill of lading was delivered for the fourth shipment.

The Eighth Circuit concluded that with regard to the first shipment, respondent did have a "fair opportunity" to relieve itself of the burden placed on its right to recover from APL for loss and damage to the first shipment created by the statute of limitations. The court further concluded that with regard to the second and

third shipments APL failed to carry its burden of proving that respondent had notice and a fair opportunity to avoid the consequences of the attempted inclusion of a statute of limitations for claims arising from post-delivery loss of and damage to the goods. Since APL never shipped the fourth shipment, there was no bill of lading and COGSA never applied.

The doctrine of fair opportunity arose with regard to COGSA §4(5), 46 U.S.C. app. §1304(5), limiting a carrier's liability for damage to cargo to $500.00 per package "unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading". 46 U.S.C. app. §1304(5).

All courts which have addressed the matter require the carrier to provide the shipper some notice of the COGSA "package/CFU" liability limitation, differing only as to the type of notice. *Henley Drilling Co. v. McGee,* 36 F. 3rd 143, 145 (1st Cir. 1994). The Ninth Circuit is thought to have the most demanding notice requirement. See 2A BENEDICT ON ADMIRALTY, Sect. 166, at pp. 16-28 to 16-29 (1993), mandating that the carrier provide the shipper legible written notice of the COGSA "package/CFU" liability limitation in the bill of lading, employing language substantially similar to COGSA §4(5). See e.g. *Nemeth v. General S.S. Corp.,* 694 F. 2d 609, 611 (9th Cir. 1982).

Other courts, including the Second, Fourth, Fifth and Eleventh Circuits simply require that the bill of lading include a "clause paramount" incorporating COGSA by reference. See e.g. *General Elec. Co. v. M/V Nedlloyd,* 817 F. 2d 1022, 1029 (2nd Cir. 1987), cert. denied, 484 U.S. 1011 (1988); *Cincinnati Milacron, Ltd. v. M/V American Legend,* 804 F. 2d 837, 837 (4th Cir. 1986), en banc (per curiam) rev'g 784 F. 2d 1161 (4th Cir. 1986); *Brown & Root, Inc. v. M/V Peisander,* 648 F. 2d 415, 424 (5th Cir. 1981); *Insurance Co. of North America v. M/V Ocean Lynx,* 901 F. 2d 934, 939 (11th Cir. 1990) cert. denied, 498 U.S. 1025 (1991).

Notwithstanding the foregoing, all of the Circuit Courts are in agreement that the carrier bears the burden of proving that it has afforded the shipper the requisite "fair opportunity" notice. See e.g. *General Elec.*, 817 F. 2d 1029; *Tessler Bros. (B.C.) Ltd. v. Italpacific Line*, 494 F. 2d 438, 443 (9th Cir. 1974); *Couthino, Caro and Co., Inc. v. M/V Sava*, 849 F. 2d 166, 171 (5th Cir. 1988); *Henley Drilling*, 36 F. 3rd at 145; *Cincinnati Milacron*, 784 F. 2d at 1163; *Mori Seika USA, Inc. v. M/V Alligator Triumph*, 990 F. 2d 444 at 449 (9th Cir. 1993).

Although there is a conflict among the circuits on certain aspects of the fair opportunity doctrine, that conflict is not involved in this case. Upon the unique facts of this case, there would not have been a different outcome had this case arisen in any of the other circuits.[2]

With regard to the first shipment, the Eighth Circuit concluded that the language contained in APL's bill of lading did provide respondent with sufficient notice of the limitation on suit provisions and yet respondent waited until after the limitations period described in the bill had expired before bringing suit. Therefore, APL prevailed on its limitations defense. With regard to the second, third and fourth shipments, the Eighth Circuit correctly concluded that APL had not sustained its burden of proof that respondent had a fair opportunity to avoid the

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[2] Even under the Fifth Circuit's position, the outcome in this case would have been the same. cf. *Couthino, Caro and Co., Inc.*, 849 F. 2d at 171 quoting from *Wuerttembergische & Badische Versicherungs-Aktiengesellschaft v. M/V Stuttgart Express*, 711 F. 2d 621, 622 (5th Cir. 1983): "As to the burden of proof issue, we are in agreement with the position of the United States Court of Appeals for the Second Circuit." (citing *In re Isbrandtsen Co.*, 201 F. 2d 281, 285 (2nd Cir. 1953)): "The clause in the *Isbrandtsen* bill of lading expressly provides that the shipper may avoid the limitation by declaring in writing the nature of the goods and higher valuation, paying extra freight. Such a provision is prima facie evidence of what it recites. The [shipper] was at liberty to show the falsity of the recital...". *Isbrandtsen*, 201 F. 2d at 285.

consequences of the attempted inclusion of a statute of limitations for claims arising from post-delivery damage to the goods, and affirmed the district court's grant of partial summary judgment denying APL's defense of limitations with respect to the second, third and fourth shipments.

II. SINCE COGSA §1304(5) IS NOT INVOLVED IN THIS CASE, IT WOULD NOT BE AN APPROPRIATE VEHICLE TO RESOLVE ANY APPARENT CONFLICT AMONG THE CIRCUITS REGARDING THE "FAIR OPPORTUNITY" DOCTRINE.

Petitioner attempts to support its petition by an exhaustive review of the supposed conflict among the various courts of appeal regarding the "fair opportunity" doctrine. However, every one of the cases cited by petitioner in that section (Petition for Writ, pp. 12-20) involve the $500.00 per package limit on the carrier's liability imposed under COGSA §1304(5).

Although the Eighth Circuit in this case used the term "fair opportunity", the issue for decision had to do with the carrier's efforts to include a statute of limitations defense under COGSA §1303(6). Therefore, this case would not be an appropriate vehicle to use in attempting to resolve any perceived conflict among the courts of appeal regarding the extensive line of cases dealing with the fair opportunity doctrine under COGSA §1304(5).

III. THIS CASE IS A "NOTICE" CASE, NOT A TARIFF RATE CASE.

Petitioner attempts to again support its petition on a supposed conflict between the circuits regarding the force of valid tariff provisions. However, this case is not a tariff rate case like all of the COGSA §1304(5) cases and even the "Himalaya clause"

cases. A Himalaya clause is an exculpatory provision which seeks to extend to non-carriers such as stevedores, terminal operators and in-land carriers, the protection available to the carrier under COGSA. See THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW, §9-20 at 331.

The COGSA §4(5) cases, supra, as well as the Himalaya clause cases involve tariff and freight rates because if the $500.00 per package limit is not applicable, the carrier will generally charge a higher tariff. This involves the carrier's tariff to be filed with the Federal Maritime Commission (FMC). However, this case is not about freight or the filed tariff. It involves the issue of "notice" of the applicability of the COGSA statute of limitations.

The Eighth Circuit in this case agreed with the Eleventh Circuit Court of Appeals in *AllState Ins. Co. v. Int'l Shipping Corp.*, 703 F. 2d 497 (11th Cir. 1983) in holding that the filing of a bill of lading with the FMC gives a shipper notice only of the tariff and does not give a shipper constructive notice of all conditions set forth in the bill of lading. The Eighth Circuit in this case and the Eleventh Circuit in *AllState* held that limitation of liability provisions are not related to rates or charges and are therefore not required to be included in the tariff. A shipper is bound only by that portion of the tariff that involves the carrier's rates or charges and is not bound by limitation of liability provisions. cf. *Marvirazon Compania, S.A. v. H. J. Baker & Brothers*, 674 F. 2d 364, 366 (5th Cir. 1982) n1 & 2, quoted in AllState, 703 F. 2d at 500. See also, *Encyclopedia Brittanica, Inc. v. SS Hong Kong Producer*, 422 F. 2d 7 (2d Cir. 1969), *cert. denied*, 397 U.S. 964 (1970).

Even in *Insurance Co. of North America v. Puerto Rico Marine Management, Inc.*, 768 F. 2d 470 (1st Cir. 1985), cert. denied, 474 U.S. 1102 (1986), the consignee received a short form bill of lading which incorporated by reference the provisions in the long form bill of lading on file with the FMC. Again, in the instant case, respondent received a long form bill of lading with regard to the first shipment and as to that shipment petitioner

prevailed on its statute of limitations defense. With regard to the last three shipments, there was no evidence that respondent ever received any bill of lading so as to give respondent notice of the limitations. Since the extension of COGSA's limitation provisions to the post-discharge period is by contract, the contract (bill of lading) must be delivered to the respondent. On the first shipment where the petitioner proved that it had delivered the bill of lading to respondent, petitioner prevailed. On the final three shipments where it did not prove that it had delivered the bill of lading to respondent, it did not prevail. This case does not present a further conflict between the circuits.

IV. THIS CASE PRESENTS A UNIQUE FACTUAL SITUATION NOT LIKELY TO RECUR.

The application and scope of this case is "fact specific". The basis upon which the legal issues in this case were resolved will ensure that it will have no importance outside of its own facts.

Petitioner, in a flight of hyperbole, contends that the issues raised in this case will impact on business contracts, filed tariffs, COGSA, "forum-shopping", insurance risk allocation, and international law. Petitioner's suggestion is simply preposterous. Dealing with petitioner's "importance" claims individually, the following conclusions are inescapable:

a. **Affect on Business Contracts.** The issues in this case will have no affect on business contracts or contract cases. The contract in this case was the bill of lading. With regard to the first shipment, petitioner proved that it had delivered the bill of lading including the language extending COGSA to the post-discharge period and including the statute of limitations. On that shipment, petitioner prevailed. On the three shipments where it could not prove that it had delivered the contract (bill of lading), necessary to extend COGSA to the post-discharge period and to include the COGSA statute of limitations, petitioner lost. This is simply basic

contract law. The result in this case will not affect contract law or contract cases whatsoever.

b. **Filed Tariffs.** This case is not a tariff rate case. Again, based on the facts of this case, no conflict among the Circuits is presented.

c. **COGSA.** This case does not create any new law interpreting or extending COGSA nor is it in conflict with COGSA decisions in other circuits. This is a case involving COGSA extension to the post-discharge period by contract and the inclusion of the statute of limitations language by contract. Without delivery of the contract, there is no COGSA application to the last three shipments. On the first shipment, where delivery of the contract was proven, Petitioner prevailed.

d. **Forum-Shopping.** This case will not encourage forum-shopping in any manner. As stated above, the outcome of this case would have been the same in any of the Circuits based on the issue of the carrier's burden of proof.

e. **Insurance Risk Allocation.** This case will have no impact on insurance risk allocation.

f. **International Law.** While the "fair opportunity" doctrine may be a creature of American jurisprudence, this case certainly is not an appropriate case to try to resolve any perceived conflict among American law and the law in other countries. Congress has not revised COGSA since 1936. Any effort to bring COGSA in line with the law in other countries is a matter for Congress to address, not this Court.

Finally, it must be noted that this case was remanded to the District Court of Minnesota for re-trial (commencing April 4, 1995) of respondent's claims regarding the second, third and fourth shipments as well as respondent's claim for punitive damages under maritime law based upon petitioner's conduct manifesting deliberate disregard for the rights of respondent. See App. A at A-1.

CONCLUSION

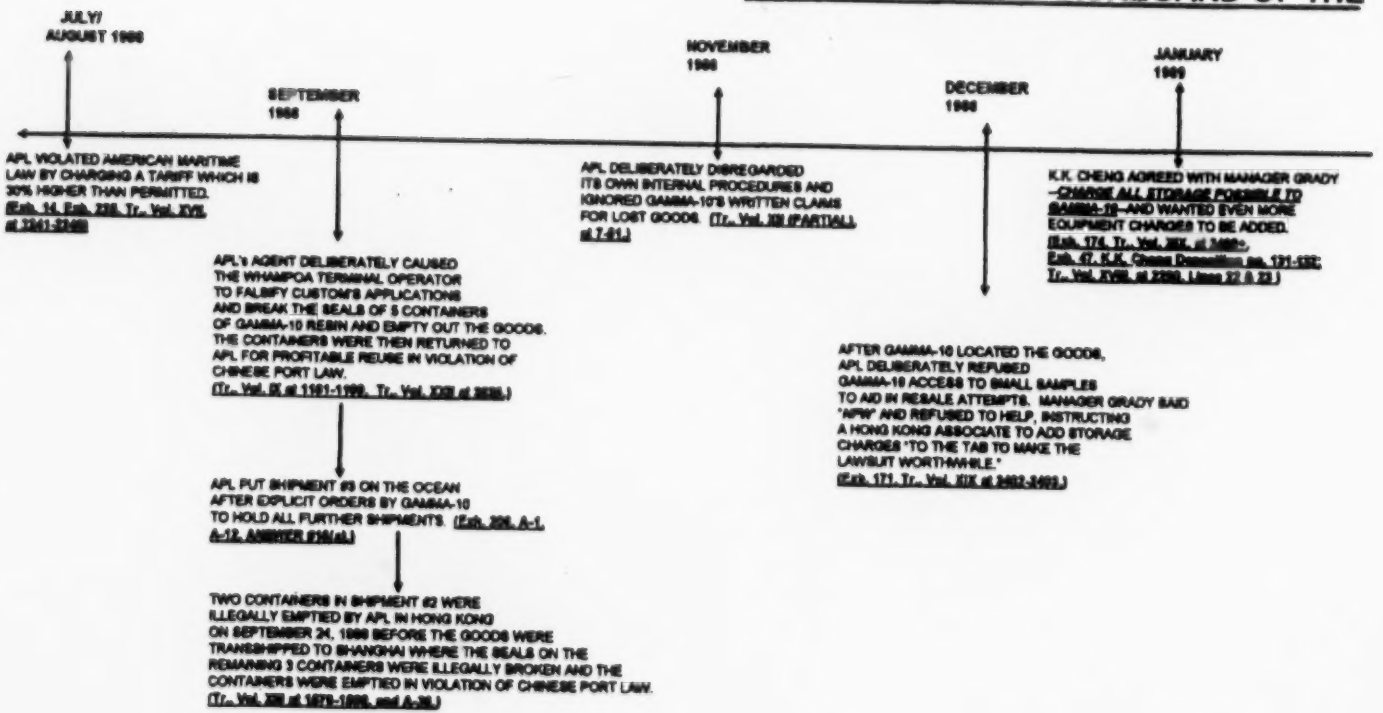
For these reasons, respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Dated: February 3, 1995.

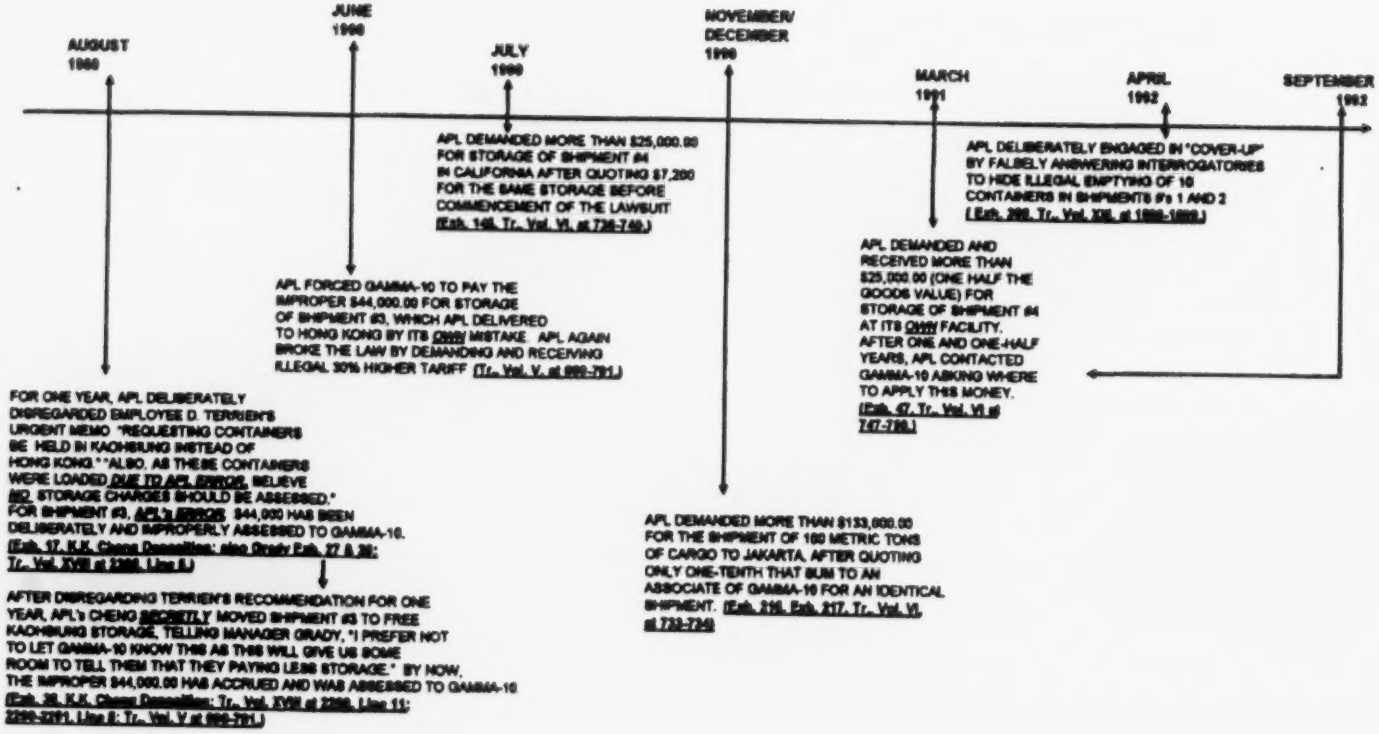
Respectfully submitted,

Scott A. Johnson
Counsel of Record
Todd M. Johnson
CHAMBERLAIN, NEATON & JOHNSON
445 Lake Street, Suite 303
Wayzata, MN 55391
(612) 473-8444
Counsel for Respondent

APL's DELIBERATE DISREGARD OF THE



RIGHTS OF GAMMA-10 1988 THROUGH 1992



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Petitioners,

v.

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Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF ASSURANCEFORENINGEN SKULD, THE BRITANNIA STEAM SHIP INSURANCE ASSOCIATION LIMITED, THE JAPAN SHIP OWNERS' MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, THE LONDON STEAMSHIP OWNERS' MUTUAL INSURANCE ASSOCIATION LIMITED, THE NEWCASTLE PROTECTION AND INDEMNITY ASSOCIATION, THE NORTH OF ENGLAND PROTECTING AND INDEMNITY ASSOCIATION LIMITED, THE STANDARD STEAMSHIP OWNERS' P & I ASSOCIATION (BERMUDA) LIMITED, THE STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION (BERMUDA) LIMITED, THE UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED, AND THE WEST OF ENGLAND SHIPOWNERS' MUTUAL INSURANCE ASSOCIATION (LUXEMBOURG) IN SUPPORT OF PETITIONERS

CHESTER D. HOOPER
Counsel of Record
HAIGHT, GARDNER, POOR & HAVENS
195 Broadway
New York, New York 10007
(212) 341-7244
Attorney for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Movants, Assuranceforeningen Skuld, The Britannia Steam Ship Insurance Association Limited, The Japan Ship Owners' Mutual Protection and Indemnity Association, The London Steamship Owners' Mutual Insurance Association Limited, The Newcastle Protection and Indemnity Association, The North Of England Protecting and Indemnity Association Limited, The Standard Steamship Owners' P & I Association (Bermuda) Limited, The Steamship Mutual Underwriting Association (Bermuda) Limited, The United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited, and The West of

England Shipowners' Mutual Insurance Association (Luxembourg), move the Court for permission to file an *amicus curiae* brief in support of the petition for certiorari filed by American President Lines, Ltd., and American President Companies, Ltd.

Petitioners have given their consent to the filing of movants' proposed brief, and a copy of their attorney's letter granting consent is being filed with the Clerk of the Court. Consent has been requested from counsel for the respondent, but as of this date such consent has not been granted. Movants accordingly file this motion pursuant to Rules 21.2(b) and 37.2.

Movants comprise ten mutual insurance associations known as "protection and indemnity clubs" (often abbreviated as "P&I clubs"). P&I clubs are "associations of shipowners banded together to spread and absorb liabilities falling on their members." GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 76 (2d ed. 1975); *see also* LESLIE J. BUGLASS, MARINE INSURANCE AND GENERAL AVERAGE IN THE UNITED STATES 386-418 (3d ed. 1991); 2 ALEX L. PARKS, THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE 832.1043 (1987); CHRISTÖF F. LUDDEKE, MARINE CLAIMS 1-5 (1993); William R.A. Birch Reynardson, *The History and Development of P&I Insurance: The British Scene*, 43 TUL. L. REV. 457 (1969); John P. Kipp, *The History and Development of P&I Insurance: The American Scene*, 43 TUL. L. REV. 475 (1969). Movants' members are owners and operators of ships of practically all maritime nations. In the aggregate, movants insure approximately 40,000 vessels totaling more than 400,000,000 gross registered tons. This represents a majority of the world's ocean-going commerce. Movants protect their

members in respect of substantially all liability risks that arise in the operation of vessels in international maritime commerce.

One significant liability risk for which movants insure their members is the risk that vessel owners will be held liable to cargo owners for the loss of or damage to cargo carried on their vessels. *See, e.g.*, BUGLASS, *supra*, at 410-411; PARKS, *supra*, at 965-982; John C. Moore, *Liability for Damage to Property Carried, to be Carried, or Which Has Been Carried*, 43 TUL. L. REV. 582-583 (1969). Thus the movants have a vital interest in the proper interpretation of the legal standards under which liability may be imposed. It is essential to the efficient operation of movants' business that rules imposing liability be clear and predictable, thus enabling parties to make rational decisions about how to insure their potential liabilities. Clear and predictable rules also enable parties to settle their disputes – when disputes arise – without resort to expensive and burdensome litigation.

The conflicts among the circuits at issue in the present case defeat the clarity and predictability on which movants depend in insuring their members. The decision below is particularly damaging, as it undermines movants' ability to rely on the tariffs filed by their members or on the bills of lading that members issue. Tariffs and bills of lading are essential documents on which everyone in the industry, including insurers, must rely. Accordingly, it is very important that the conflicts raised here be resolved, and that the erroneous views of the courts below be corrected.

IV

For these reasons, movants respectfully request leave to file the attached *amicus curiae* brief in support of the petition for certiorari filed by American President Lines, Ltd., and American President Companies, Ltd.

CHESTER D. HOOPER
Counsel of Record
HAIGHT, GARDNER, POOR & HAVENS
195 Broadway
New York, New York 10007
(212) 341-7244
Attorney for Movants

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No. 94-1188

In The

Supreme Court of the United States

October Term, 1994

AMERICAN PRESIDENT LINES, LTD., and
AMERICAN PRESIDENT COMPANIES, LTD.,

Petitioners,

v.

GAMMA-10 PLASTICS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Eighth Circuit

BRIEF *AMICUS CURIAE* OF ASSURANCEFORENINGEN SKULD, THE BRITANNIA STEAM SHIP INSURANCE ASSOCIATION LIMITED, THE JAPAN SHIP OWNERS' MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, THE LONDON STEAMSHIP OWNERS' MUTUAL INSURANCE ASSOCIATION LIMITED, THE NEWCASTLE PROTECTION AND INDEMNITY ASSOCIATION, THE NORTH OF ENGLAND PROTECTING AND INDEMNITY ASSOCIATION LIMITED, THE STANDARD STEAMSHIP OWNERS' P & I ASSOCIATION (BERMUDA) LIMITED, THE STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION (BERMUDA) LIMITED, THE UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED, AND THE WEST OF ENGLAND SHIPOWNERS' MUTUAL INSURANCE ASSOCIATION (LUXEMBOURG) IN SUPPORT OF PETITIONERS

Assuranceforeningen Skuld, The Britannia Steam Ship Insurance Association Limited, The Japan Ship Owners' Mutual Protection and Indemnity Association, The London Steamship Owners' Mutual Insurance Association Limited, The Newcastle Protection and Indemnity Association, The North of England Protecting and Indemnity Association Limited, The Standard Steamship Owners' P & I Association (Bermuda) Limited, The Steamship Mutual Underwriting Association (Bermuda) Limited, The United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited, and The West of England Shipowners' Mutual Insurance Association (Luxembourg) respectfully submit this brief as *amici curiae* in support of the petition for certiorari filed by American President Lines, Ltd. ("APL"), and American President Companies, Ltd.

INTEREST OF AMICI CURIAE

The interest of *amici curiae* is explained in the motion filed in conjunction with this brief. *See* supra pages II-III.

SUMMARY OF ARGUMENT

The current case is typical of thousands of transactions that occur every year. Ocean shipments are carried on standard terms, and the relevant provisions in APL's standard-form bill of lading are essentially the same as those of most other ocean carriers. The factual situation is also not unusual. This case thus offers an ideal vehicle to

resolve the issues presented in a context that will be applicable to the entire industry.

To deny APL the benefit of its standard-form bill of lading in this situation imposes an unreasonable burden on the entire shipping industry – essentially depriving the industry of the benefit of standard-form contracts. This will benefit no one, and will simply increase costs that will ultimately be passed on to consumers.

There is no legitimate basis for the so-called "fair opportunity" doctrine, and the Court should take this opportunity to reject it. The burden of the intercircuit and international conflicts affects everyone in the industry, and the mere existence of the doctrine is an invitation to pointless litigation.

ARGUMENT

1. The Current Case Offers an Ideal Vehicle to Resolve the Issues Presented in a Context that will be Applicable to the Entire Shipping Industry.

The facts of the present case are entirely typical of thousands of transactions that occur every year. Common carriers, such as APL or the members of the *amicus* P&I clubs, offer their services at competitive rates to shippers throughout the world who wish to have their goods carried by sea. Literally millions of times each year, an ocean carrier agrees to transport a shipper's cargo to or from the United States on standard terms. There is a simple reason why such a high proportion of the nation's imports and exports are carried by sea: compared to the value of the goods, compared to the service performed, or

compared to the price of alternative methods of transportation, the costs of ocean shipment are relatively low.

One reason that an ocean carrier's freight charges are so low is that transactions are highly standardized. The parties do not individually negotiate the terms and conditions under which the transportation will take place, any more than the cruise line passengers in *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991), negotiated the terms of their individual tickets. Indeed, no large-scale business with a high volume of relatively inexpensive transactions can afford to negotiate the terms of each contract individually. Ocean carriers respond to this situation in the same way as other businesses: they draft standard-form contracts which govern the terms and conditions under which they are willing to perform their services. In the United States, these contracts, which are typically evidenced by bills of lading, are governed by the Carriage of Goods by Sea Act ("COGSA") 46 U.S.C. app. §§ 1300-1315, and the Harter Act, 46 U.S.C. app. §§ 190-196, and are subject to regulation by the Federal Maritime Commission.

APL's standard-form bill of lading is typical for the industry, particularly with respect to the clauses at issue in this case. Virtually every bill of lading in the U.S. trade contains a clause paramount similar to APL's. For shipments *from* the United States, section 13 of COGSA requires the bill of lading to include a clause paramount reciting that the bill "shall have effect subject to the provisions of th[e] Act." 46 U.S.C. app. § 1312; *see generally* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 185-186 (2d ed. 1975). Although the statute does not require the clause paramount to extend

COGSA's applicability to the pre-loading and post-discharge periods, most carriers nevertheless do so. This may seem surprising, given that COGSA generally imposes more liability on a carrier than it would be required to assume under the Harter Act. *See* Michael F. Sturley, *The History of COGSA and the Hague Rules*, 22 J. MAR. L. & COM. 1, 37 & nn.292-295 (1991). But carriers are usually willing to accept somewhat higher liability in return for the uniformity, certainty, and predictability that they should be able to achieve by having COGSA – the U.S. enactment of an international uniform law treaty commonly known as the "Hague Rules"[1] – apply during the entire period that they have control of the goods.

The time-for-suit clause in APL's bill of lading is also typical. In substance, it repeats the fourth paragraph of section 3(6) of COGSA, 46 U.S.C. app. § 1303(6), and article 3(6) of the Hague Rules. It has thus been endorsed by Congress and the international community. Even before COGSA's enactment, U.S. courts recognized and enforced time-for-suit clauses, some of which were as short at three months. *See e.g., United States v. A.C. Monk & Co.*, 57 F.2d 1015, 1018 (3d Cir. 1932); *Schnell v. United States*, 30 F.2d 676, 677 (2d Cir. 1929), *cert. denied*, 279 U.S. 858 (1929); *Ikuno v. Morris & Co.*, 22 F.2d 140, 142 (4th Cir. 1927), *cert. denied*, 276 U.S. 626 (1928); *see also Armour & Co. Aktieselskab v. Gjerduldsen*, 15 F.2d 553, 554 (4th Cir. 1926) (enforcing six-month time-for-suit clause); *Olivier Produce Corp. v. United States*, 20 F.2d 214, 215 (W.D. Wash.

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[1] Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, T.S. No. 931, 120 L.N.T.S. 155.

1927) (same). In light of this history, it is hardly surprising that virtually every bill of lading in the world provides for a time-for-suit limitation.

Finally, APL's decision to file its standard-form bill of lading with the Federal Maritime Commission as part of its tariff was routine. Every carrier in the U.S. trade is required by law to do so. *See* Shipping Act of 1984, § 8(a)(1)(E), 46 U.S.C. app. § 1707(a)(1)(E).

Not only is the legal situation presented by this case entirely typical in the shipping industry, the relevant[2] factual background is also typical. With millions of shipments going to and from the United States by sea each year, it is inevitable that some cargo will be delayed, mishandled, damaged, or lost. Although there are losses at sea, most losses occur during loading and unloading (when cargo is subject to the risks of handling), shortly before the cargo is loaded or shortly after it is unloaded (when it is awaiting further movement, and thus less likely to be so well protected as it is on board the vessel), or when it is in storage in the port area (and thus exposed to land-based theft risks that are less common on the high seas). In short, losses during the pre-loading or post-discharge period – when COGSA generally applies as a matter of contract rather than with the force of law – are normal in the industry.

The only thing unusual about this case is the position taken by the courts before in resolving a very typical

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[2] Certain aspects of this case in the lower courts were unusual, but those aspects have nothing to do with the issues currently before the Court.

dispute between a shipper and a carrier. The Eighth Circuit, along with the Eleventh Circuit, has departed from the long-accepted view that filed tariffs are binding on shippers. This conclusion is in tension with decisions of this Court and in open conflict with a decision of the First Circuit and decisions in the Fifth Circuit. The Eighth Circuit's position on the so-called "fair opportunity" doctrine is more extreme than that taken in the other seven circuits to have addressed the issue (and those seven circuits were already in irreconcilable conflict).

Because the legal framework and the relevant factual situation is so typical of so many cases, the current case offers an ideal vehicle to resolve the issues presented in a context that will be applicable to the entire shipping industry.

2. The Decision Below Places an Unreasonable Burden on the Entire Shipping Industry

Petitioners have already explained the importance of resolving the conflicts presented by this case, and *amici* endorse those arguments. *Amici* stress, however, that the importance of resolving the conflicts is by no means limited to APL. When the Court considers the position of *amici* and their members, it will see that resolution of these conflicts is far more important than that. Whereas APL has offices in 40 different foreign countries, *see* Petition at 22, *amici* and their members do business in virtually every maritime country of the world. Their ships call at every port in commercial service. The problems associated with disuniformity are even more serious in this broader context.

Quite apart from the serious problems created by the intercircuit and international conflicts at issue in this case, the decision below places an unreasonable burden on the entire shipping industry. Under the Eighth Circuit's decision, a carrier cannot rely on its contractual rights unless it individually negotiates the terms of each bill of lading with each shipper.[3] This would be comparable to telling a department store that it must bargain with its customers over the terms of every sale, or telling a credit card company that it must obtain its cardholders' agreement on the conditions of each extension of credit, or telling an airline that its ticket terms are unenforceable unless its passengers "accept" them before each flight.

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[3] APL was able to rely on its contractual rights with respect to the first shipment because it issued the bill of lading promptly after loading and respondent negotiated the bill to a bank almost immediately. ("Negotiation," in this sense, refers to the process by which a holder transfers a document of title. *See generally* UNIFORM COMMERCIAL CODE § 7-501.) As petitioners explain, however, a carrier is not always in a position to issue the bill of lading promptly after loading. *See* Petition at 11-12. And even when carrier can issue the bill of lading promptly, it has no control over how quickly a shipper negotiates the bill to a third party. If the goods are damaged during loading, the shipper may never negotiate the bill of lading – if one is even issued. *Cf. Caterpillar Overseas, S.A. v. Marine Transport, Inc.*, 900 F.2d 714 (4th Cir. 1990) (no bill of lading was issued because the cargo was damaged before loading; case resolved on the basis of clauses in standard-form bill of lading that would have been issued but for the damage). If the goods are consigned to an affiliated company, there would be no need to negotiate the bill. The Eighth Circuit offers no clue as to how a shipper might "accept" the terms of a bill of lading other than by agreeing to them individually or by negotiating the issued bill to a third party.

This is simply not the way that business works, nor should it be. Department store customers, holders of credit cards, and airline passengers all know that their transactions are governed by standard terms, and that they can obtain a copy of these terms if they care to know what they are. As a multi-national business,[4] respondent should be held to at least as high a standard here. Respondent clearly knew that it had a contract with APL. (There would be no basis for its present lawsuit otherwise.) Perhaps it actually knew of the one-year time-for-suit provision that was part of this contract (because such a term is both a part of COGSA and typical in the industry); the only other plausible scenario is that it did not care about terms of this sort (because it could so easily have learned what the terms were, either by asking APL or by consulting the filed tariff). In either case, it is unreasonable not to hold respondent to the terms of the contract.

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[4] By the very nature of the industry, the shippers with whom *amici* and their members deal are almost inevitably multi-national businesses. The unreasonableness of the Eighth Circuit's decision can be illustrated in this context by considering the trip that Joseph Kopstein, respondent's president, took to China in November 1988 "to find the missing resin from the [first] two shipments." 32 F.3d at 1247; Petition, Appendix A, at A-3. As an individual passenger, he did not expect to negotiate with his airline over the terms and conditions on his ticket. He may have paid for this ticket with a credit card, but he did not expect to negotiate with his bank over the terms and conditions on which he would make payment. Why did he expect his company to receive more "consumer protection" for its plastic resin (as the Eighth Circuit held with respect to the second shipment) then he as an individual consumer did for himself?

Finally, it is worth noting that the Eighth Circuit's burden is so unreasonable that it applies with respect to each bill of lading, not with respect to each shipper. In the present case, the court below held that respondent had "accepted" the terms and conditions on the first bill of lading, including the time-for-suit provision. Presumably this means that the court recognized that respondent was properly bound by all of the provisions in the first bill of lading and that it had received sufficient notice of these terms. But when the court considered the second, third, and fourth shipments, all of which were on precisely the same terms in every relevant respect, it held that respondent was no longer bound because it had not received proper notice!

Requiring *amici* and their members to give second, third, and fourth notices, when first notices have already been properly received, serves no purpose whatsoever. It is simply another indication of how the decision below, if allowed to stand, will increase the costs of the system for everyone. Either carriers will go through with the pointless exercise, raising their rates to cover the cost, or carriers will operate under the risk of higher liability, once again raising their rates to cover the cost. All of these costs will ultimately be borne by the consumers who purchase goods carried by sea (or manufactured from raw materials carried by sea), and we will all be the losers.

3. The Existence of the "Fair Opportunity" Doctrine Places an Unreasonable Burden on the Entire Shipping Industry

Amici agree with petitioners that there is no legitimate basis for the so-called "fair opportunity" doctrine, and that this Court should reject the requirement and bring the United States into line with the rest of the world's maritime nations. *See* Petition at 14. Even if the Court does not consider this case an appropriate vehicle to reject the doctrine, however, it can at least minimize the intercircuit conflict by ruling on the tariff issue. Indeed, holding that a tariff provides constructive notice of the terms and conditions on file would for all practical purposes resolve most of the fair opportunity cases that have so troubled the lower courts until now.

Petitioners have already explained the importance of resolving the "fair opportunity" conflict. Once again, *amici* endorse these arguments and add only a few observations. First, the burden of the doctrine is far greater for *amici* than it is for APL. While it is a real burden for APL to deal with the intricacies of the doctrine in each circuit that has ruled on it, particularly when the U.S. courts are also in conflict with decisions in foreign countries where APL does business, at least APL's task is limited to considering how the doctrine affects its particular bill of lading. *Amici* are forced to deal with the same conflicts, but with respect to the bills of lading issued by each of their members.

Second, the mere existence of the doctrine imposes a burden on the shipping industry. Even if there were no true conflicts among the circuits (which is, unfortunately,

not the case), the existence of the doctrine encourages cargo plaintiffs with no legitimate basis for a claim to allege a violation of the doctrine in hopes of obtaining a favorable settlement or convincing a court to expand the doctrine. Most of these attempts have failed. *See, e.g., Henley Drilling Co. v. William H. McGee & Co.*, 36 F.3d 143 (1st Cir. 1994) (rejecting a proposed expansion of the fair opportunity doctrine); *Carman Tool & Abrasives, Inc. v. Evergreen Lines*, 871 F.2d 897 (9th Cir. 1989) (same); *General Electric Co. v. M/V Nedlloyd*, 817 F.2d 1022 (2d Cir. 1987), *cert. denied*, 484 U.S. 1011 (1988) (same). Although the carriers and their P&I clubs in such cases ultimately prevailed, the costs of defending the suits constitute a needless expense for the industry in which no one wins and everyone (including the court system) loses. The occasional decision, such as that below, in which a claimant succeeds in expanding the doctrine will encourage further rounds of pointless litigation unless this Court steps in to correct the problem.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted

CHESTER D. HOOPER
Counsel of Record
HAIGHT, GARDNER, POOR
& HAVENS
195 Broadway
New York, New York 10007
(212) 341-7244

Attorney for Amici

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No. 94-1188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

AMERICAN PRESIDENT LINES, LTD., and AMERICAN PRESIDENT COMPANIES, LTD.,

Petitioners,

v.

GAMMA-10 PLASTICS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

MICHAEL A. SNYDER
Counsel of Record
RAY, ROBINSON, CARLE, DAVIES & SNYDER
850 West Jackson Boulevard
Suite 310
Chicago, Illinois 60607
(312) 421-3110
Attorney for Petitioners

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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No. 94-1188

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GAMMA-10 PLASTICS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

Petitioners, American President Lines, Ltd. ("APL"), and American President Companies, Ltd., respectfully submit this Reply to the Brief in Opposition of Respondent Gamma-10 Plastics, Inc.

TARIFF PROVISIONS AS A SOURCE OF NOTICE

Respondent argues vigorously that the central issue in this case is "notice." *See, e.g.*, Brief in Opposition ("Br. Opp.") at 9. We agree. Respondent was on constructive notice of APL's one-year time-for-suit limitation because, among other reasons, the time-for-suit provision was in-

cluded in APL's filed tariff. Accordingly, respondent is bound by the limitation and its suit should be dismissed.

There is an acknowledged conflict among the circuits on whether a filed tariff provides constructive notice of a one-year time-for-suit limitation. The First Circuit holds that it does while the Eleventh Circuit holds that it does not. *See* Petition for Certiorari ("Petn.") at 9-11. The court below followed the Eleventh Circuit and rejected the views of the First Circuit. In addition, the Fifth Circuit has held that a filed tariff provides constructive notice in analogous cases involving the terms and conditions of a bill of lading. *See* Petn. at 10.

Respondent argues that the tariff is irrelevant here because APL did not issue bills of lading for the second, third, and fourth shipments as quickly as it did for the first shipment, but the argument misconceives the nature of a bill of lading. Contrary to respondent's assertions, *see, e.g.*, Br. Opp. at 11, a bill of lading is not the contract of carriage; a bill of lading evidences the contract already in force. *See, e.g.*, Petn. at 3 n.1 (quoting clause paramount) (bill of lading reference to "the transportation agreement evidenced hereby"). Indeed, respondent's first substantive sentence recognizes that "[t]his case arises out of a 1988 contract." Br. Opp. at 2. The parties entered into this contract during the summer of 1988, prior to the first shipment. No one has yet disputed the contract's existence. The only issue is whether it will be on APL's standard terms, included in the filed tariff, or on some other basis.

Respondent's argument also ignores the reason for APL's failure to issue bills of lading sooner. On the second and third shipments, APL declined to issue "freight prepaid" bills (which respondent needed to obtain payment under its letter of credit) until respondent actually prepaid

the freight. On the fourth shipment, APL was unable to issue a bill of lading because respondent never named a specific port of discharge. Yet respondent now argues that it is APL who should be penalized for this failure to make timely payment and provide timely information. *Cf.* Petn. at 11-12. This is an excellent illustration of the weakness with the Eighth Circuit's analysis and the value of relying on the filed tariff to provide constructive notice.

THE FAIR OPPORTUNITY DOCTRINE

Respondent admits that there is a conflict among the circuits on the fair opportunity doctrine, *see* Br. Opp. at 8, but argues that this case is a poor vehicle for resolving the conflict because (i) it does not involve the package limitation under section 4(5) of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. app. § 1304(5), and (ii) there is no conflict on the proposition that the carrier has the initial burden of proof under the doctrine.

Respondent is correct in observing that every prior fair opportunity case involved the COGSA package limitation. Indeed, in the court below we maintained that the doctrine should not be extended beyond the section 4(5) context. But respondent cited section 4(5) cases to the Eighth Circuit and successfully argued that the doctrine should be expanded to govern the time-for-suit limitation here. *See, e.g.*, Reply Brief of Appellant/Cross-Appellee, *Gamma 10 Plastics, Inc. v. American President Lines*, 32 F.3d 1244 (8th Cir. 1994) (No. 93-3285) (citing *Komatsu, Ltd. v. States S.S. Co.*, 674 F.2d 806 (9th Cir. 1982); *General Electric Co. v. M/V Nedlloyd*, 817 F.2d 1022 (2d Cir. 1987), *cert. denied*, 484 U.S. 1011 (1988); *Sony Magnetic Products v. Merivienti*, 668 F. Supp. 1505 (S.D. Ala. 1987)). It is somewhat ironic that respondent now believes

these same cases have nothing to do with the time-for-suit limitation. It is also incorrect. The Eighth Circuit adopted the fair opportunity analysis, and is now a part of the intercircuit and international conflict.

Respondent's second argument on this issue is both wrong and irrelevant. It is wrong because not every court has held that the carrier has the initial burden of proving fair opportunity, even in the package limitation context. *See Henley Drilling Co. v. William H. McGee & Co.*, 36 F.3d 143, 146 n.5 (1st Cir. 1994); *Anticosti Shipping Co. v. St-Amand*, 1959 S.C.R. 372, 374-377, 19 D.L.R.2d 472, 473-475, 1959 AMC 1526, 1527-29 (Can.). More importantly, the principal dispute here is about whether APL satisfied the burden. The court below held that APL failed because it found actions inadequate that other courts have held sufficient. Even if APL properly bears the burden here, APL satisfied that burden by, among other things, including the time-for-suit provision in its filed tariff. There is a clear and acknowledged conflict among the circuits on this issue, and the court below is undeniably a part of it. *See, e.g.*, Petn. at 15.

RESPONDENT'S OTHER ARGUMENTS

Respondent asserts that this case presents a unique factual situation that is not likely to recur, Br. Opp. at 11, but offers no explanation as to why this case is unusual. In truth, the facts relevant to the question presented to this Court are entirely ordinary. This point has already been effectively demonstrated in the Brief *Amicus Curiae* of Assuranceforeningen Skuld, et al. *See* Brief *Amicus Curiae* at 3-7. *Amici*, who represent a majority of the world's ocean-going commerce, are certainly in a position to know what is normal in the industry.

Respondent hints that this case may be unworthy of the Court's attention because it is interlocutory. Br. Opp. at 12. While it is true that the case has been remanded to the district court for a new trial, APL's entitlement to the time-for-suit provisions would not be an issue at that trial. This case is ripe for review on this question now. Nothing could be gained in a new trial that would be of any relevance to this issue, and the district court would be forced to spend several weeks in a trial that may turn out to be meaningless. Sound practices of judicial economy militate in favor of review of the Eighth Circuit's decision now, while the expense of a retrial can still be avoided.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL A. SNYDER
Counsel of Record
RAY, ROBINSON, CARLE, DAVIES & SNYDER
850 West Jackson Boulevard
Suite 310
Chicago, Illinois 60607
(312) 421-3110
Attorney for Petitioners

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